No. 86-1742

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STEPHEN MARMOTT, ET AL.

Petitioners,

v.

MARYLAND LUMBER CO., ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Questions Presented

(1) Is it permissible for a lawyer to represent both companies in an oral agreement to merge when that lawyer has a substantial interest in one company, makes no disclosure to the owner of the second company (a layman) of the latter's right to independent counsel, promises that lay owner to put the oral merger agreement into writing, fails to do so, and then relies on his breach to assert (in a Rule 56 proceeding) that no merger agreement of any kind took place?

(2) When the lay owner of the second company relied on the promise of the lawyer to put the oral merger agreement into writing, ceased doing business under his own name and style on the first working day after entering the oral merger agreement and used the first company's name and otherwise immediately

performed his obligations under the oral merger agreement (in reliance on the lawyer's promise which was part of the oral agreementof merger) can the lawyer's failure to put the oral merger agreement into writing be used by him (and by his company) in a Rule 56 proceeding to assert that no agreement whatever was reached between the companies?

(3) When it is uncontested by both parties to an oral agreement of merger that six of the nine provisions of the oral agreement of merger were performed, is it permissible for a Court to ignore this uncontested evidence and rule--in a Rule 56 proceeding--that no agreement whatever was reached between the companies?

(4) When it is uncontested by both companies in an oral agreement of merger

that six of the nine provisions of the oral agreement were performed, and this performance cannot be explained in the absence of an agreement between the companies, is the proponent of that agreement (whose existence and all of whose terms is evidenced by sworn testimony) entitled, in a Rule 56 proceeding, to an inference in his favor both as to the existence of the oral agreement and as to the substance of the remaining provisions of it.

(5) Do the sworn averments that two companies entered an oral merger agreement, which averments specifically spell out all nine provisions of that agreement in sworn testimony, plus uncontested evidence that six of the nine provisions of that oral agreement were performed, raise an issue of fact as to the existence of that agreement and its provisions, precluding the entry

of summary judgment (in a Rule 56 proceeding) that no such agreement was ever reached.

(6) Does the Maryland "infra annum" provision of its Statute of Frauds apply in this case?

Parties to the Proceeding

Petitioners are Stephen Marmott, his wife Irene, and the lumber company Irene Lumber Supply, Inc., (a Virginia Corporation), all of whose shares are owned by the Marmotts. Respondents are Maryland Lumber Co. (a Maryland corporation) and Milling, Drying and Treating (a Maryland corporation) James Kolker and Fabian Kolker. 1/

1/ Petitioners will hereafter be referred to as "Marmott" and "Irene" (referring to Irene Lumber & Supply, Inc.); Marmott's wife, Irene will be referred to as "Irene Marmott". The Respondent Company will hereafter be referred to as "Maryland Lumber". Respondent Milling, Drying and Treating had no part in the appeal to the Fourth Circuit and are not involved in this Petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Canons

Texts

Opinions Below Are Printed in the Appendix 1A/

Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 2101 (c) of Title 28, U.S.C.

Statutes Involved

Rule 56 (b), F.R.C.P.:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

Rule 56 (c), F.R.C.P.:

> "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing

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1A/ The opinion of the U.S. Court of Appeals for the Fourth Circuit, dated December 22, 1986, is found at App. 1-27; that Court's order denying Rehearing, dated January 30, 1987, is found at App. 27A; the memorandum and order of the U.S. District Court for the District of Maryland, dated November 4, 1985 is found at App. 28-64;

> affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entiled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Statement of the Case

The following facts are taken from affidavits filed with the Court or from deposition testimony.

Plaintiff Marmott and Plaintiff Irene Lumber & Supply, Inc. ("Irene") 2/ entered business relations with Defendant Maryland Lumber Company ("Maryland Lumber") relevant to this case in May of 1981. A commission arrangement was then entered between the parties.

2/ App. 70-71;

As background to what follows it is essential to note that Fabian Kolker was then an attorney 3/ as well as a major stockholder and chief executive officer of appellee Maryland Lumber Company ("Maryland Lumber"). 4/ His son, James Kolker, had been held out throughout the relationship between the parties as an officer of Maryland Lumber. 5/ Maryland Lumber was a closely-owned family company. Irene was owned by Appellant Stephen Marmott and his wife Irene Marmott (who was inactive in the operation of Irene), with minor interests held by Marmott's father-in-law and mother-in-law, Martin and Dorothy Ratick. 6/ It, too, was a

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3/ App. 79;
4/ App. 77;
5/ Ibid;

closely-held family company. Irene's participants in the events of December 19, 1981 (the key date in this case) Marmott and Ratick, are both laymen. 7/

In December 1981 discussions between Marmott and the Kolkers commenced, looking toward a different kind of arrangement between Irene and Maryland Lumber. These discussions led to a meeting between the Kolkers, Marmott and Martin Ratick, Marmott's father-in-law 8/ on Saturday, December 19, 1981 at the Alexandria Yard at 217 South Henry Street where Irene did business. It is Marmott's and Ratick's sworn testimony that in that meeting an agreement to merge Irene into Maryland Lumber was reached by the Kolkers and Marmott, an agreement which Fabian Kolker, a lawyer, was to put in writing. 9/

7/ App. 79; That fact is uncontested;
8/ App. 74-75; App. 96;
9/ App. 79 et seq.; App. 103;

Marmott brought to the table on December 19 substantial assets, considerable goodwill in the lumber business, a moderate line of credit and a record of success as a salesman of building materials.10/

During the December 19, 1981 meeting Martin Ratick took notes of what transpired.13/ That day these notes were typed by Mrs. Ratick, who routinely typed up business notes made by her husband.14/ This typed document14A/ reflects precisely what was agreed to by Marmott and the Kolkers at the December 19 meeting, as Ratick and Marmott have testified under oath.15/

It is essential to note that before the December 19 meeting broke up Fabian Kolker -- the lawyer as well as chief

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10/ App. 73-74; 13/ App. 97;14/ Ibid;
14A/ The "Minutes of Special Meeting" App. 64-67; signed by Marmott and Ratick on December 19 or 20; App. 75;
15/ App. 75; App. 96-97;

executive officer of Maryland Lumber -- undertook to perform all the necessary legal tasks to put the oral agreement into effect, saying (as he is quoted in Marmott's testimony):

> "The agreement would be made up by Fabian Kolker and he would perform all the necessary legal things to be done because he said it is the bookkeeping system involved and he wasn't sure if we were to operate as a division or under a separate name.
>
> We left that to him. He was an attorney.16/

As testified by Marmott, Fabian Kolker stated:

> "We had made our basic agreement. He "(Fabian Kolker)" said he was going to handle the legal things with it, to do it right.17/
>
> He said he was an attorney and, 'I will do it. It is complicated, he said.'"18/

16/ App. 106-107;
17/ App. 107;
18/ Ibid;

Fabian Kolker's promise to put the oral merger agreement into writing (supra) and his statement that:

> "he would handle the legal things with it"

which were:

> "complicated"

constituted an undertaking by Fabian Kolker which was part of the oral agreement reached between the parties on December 19. At no time during that meeting did Kolker inform the Marmotts of their right to independent counsel of their own.19/

Thereupon the parties shook hands on December 19 and left.

As Marmott notes in his affidavit, the entire transaction was between two

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19/ The entirety of Fabian Kolker's statements concerning what he would do is set forth in the quotes (above) from Marmott's sworn testimony.

families (Marmott's, together with his in-laws, the Raticks, and the Kolkers). Marmott and his family trusted the Kolkers to perform as agreed on December 19.22/

Significantly, the agreement of December 19 between the parties was to go into effect immediately, on the first working day (December 21, 1981) after the meeting. And it did. Most significantly, on December 21, 1981, Marmott and the Yard at 217 South Henry Street ceased doing business as Irene.23/ Although the precise name of the merged entity that would emerge when Fabian Kolker had memorialized the agreement was not yet fixed, it was agreed (at the December 19 meeting) that the style under which the Yard and office would do business starting

22/ App. 80;
23/ App. 81

December 21 was to be "Maryland Lumber Company of Virginia".24/ And that is precisely what occurred. The telephone was answered with that name, and all of Marmott's and his staff's contacts with customers and suppliers (after December 21, 1981) were in that name.25/ All of the provisions of the December 19, 1981 agreement necessary for doing business in accord with the agreement went into effect immediately.26/ On December 21, 1981, the personnel at the Yard were put on Maryland Lumber's payroll.27/

Within days a truck and fork lift was sent to the Alexandria Yard by Maryland Lumber.28/ As of December 21, 1981 all invoicing of sales from the Yard and by Marmott and his staff outside of the Yard were invoiced by Maryland Lumber

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24/ App. 81;
25/ Ibid; App. 83;
26/ Ibid;
27/ App. 81;
28/ App. 81-82;

(not Irene) on Maryland Lumber invoices.29/ Inventory (selected by Marmott) was sent to the Alexandria Yard by Maryland Lumber, was mixed with the existing Irene inventory and put up for sale.30/ All of the operating expenses of the 217 South Henry Street Yard (expenses which prior to December 19, 1981 had been paid by Irene) were paid by Maryland Lumber, after December 19.31/

Two employees of Maryland Lumber, Norman Jurkscheit and Mike Ogrzalek, who theretofore had been working at Maryland Lumber's yard in Baltimore, were dispatched to the Alexandria yard and began working full time there.32/

All of this took place within two weeks of December 19, 1981.33/ In

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29/ App. 82;
30 Ibid
31/ Ibid;
32 App. 82;
33/ App. 83; App. 81-83;

addition, Marmott commenced receiving a draw of $600.00 per week against the 50% of profits generated by him at the Yard and in a sales area allocated to Marmott by the parties at the December 19 meeting, (including northern Virginia, Maryland south of Rockville, and the District of Columbia.34/

Of the nine provisions found in the "Minutes of Special Meeting" typed by Mrs. Ratick on December 19 from notes taken by Mr. Ratick at the meeting on that day, six were fully performed by both parties within two weeks after December 19, 1981.35/ It should also be noted that every provision of the December 19 Agreement requiring performance by Irene and Marmott was wholly performed by Marmott and Irene,

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34/ App. 83;
35/ App. 81-83;

although the written Agreement promised by Fabian Kolker was not produced.

Most importantly in real terms, Marmott ceased doing business as Irene and Irene stopped doing business under that name both on December 21, 1981.36/ That is certainly full performance of the December 19 Agreement by Marmott and Irene.

The only provisions in the December 19 Agreement that were not fully performed were (1) the requirement that Maryland Lumber set up a separate accounting system for the Alexandria Yard (which was promised by the Kolkers on December 19, but not done 37/ and (2) the division of profits generated by the "Alexandria Division", i.e., generated from the Alexandria Yard and from the sales area allocated to Marmott, 50-50 between Marmott and James Kolker (or his

35/ App. 81-83;
36/ App. 81;
37/ App. 83;

designate); (3) recognition and exercise of the option to purchase Maryland Lumber stock given to Marmott. These provisions are found in paragraphs fourth, eight and ninth, of the "Minutes of Special Meeting."38/

The written agreement promised by Fabian Kolker, however, was not forthcoming and became a problem.39/ Finally, in early March when this agreement was not produced (3 months after it had been promised during which Marmott and Irene had performed the merger terms incumbent on them faithfully) James Kolker and Norman Jurkscheit precipitated the problem by requesting that the telephone number in the Alexandria yard be permanently

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38/ App. 108; : Maryland Lumber's breach of these provisions precipitated this suit;
39/ App. 85;

transferred to Maryland Lumber. Marmott then again requested the written merger agreement and was told by both James Kolker and by Jurkscheit:

> "Well, look Fabian can't do it now. And why don't you go to a local attorney and get the papers drawn up for us and we will sign them"40/

Then, and only then in response to this request, on or about March 12, 1982 Marmott then consulted Matt Clary III, Esq., a Fairfax (Virginia) attorney to do so.41/ Marmott gave Clary a copy of the "Minutes of Special Meeting" and instructed him to consult with the Kolkers and prepare a document reflecting the agreement of December 19, 1981, which both parties had been operating under for close to three months. Marmott was repeatedly

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40/ App. 111-116;
41/ App. 117;

assured that the Kolkers would sign the merger agreement, and transfer the telephone number simultaneously.43/

What attorney Clary did and what he did not do is essential. His deposition was taken. Attorney Clary's testimony was:

> "A. Steve's understanding, as he related it to me, was that the parties had reached this agreement as appears on Depositon Exhibit and were already implementing the agreement, were already living by the agreement, and that there had been a failure on the part of the parties -- and I don't recall if there was a suggestion that one person or the other had undertaken a responsibility to do it -- but there had been a failure to document, to provide the legal documentation necessary or desirable, at least shall we say, to document in legal terms what the business arrangement was that had been worked out and that the parties were living by."44/

The " Deposition Exhibit" referred to by Clary was the "Minutes of Special

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43/ App. 115;
44/ App. 125-126;

Meeting" 45/ which was the "business arrangement""that the parties were living by".

During Marmott's deposition a major effort was made by Counsel for Defendant Maryland Lumber to elicit from Marmott (a layman) his opinion on the difference between a "joint venture" and a "merger". Understandably, the result was not fruitful. Nonetheless throughout this grilling of a layman on legal concepts -- that often confound lawyers -- Marmott held his ground. He maintained then as he had before, and has since, that a merger of Irene into Maryland Lumber had been agreed to at the December 19 meeting.

Queried by Defendants' counsel, Marmott was asked concerning a diagram:46/

45/ App. 125; App. 86; App. 64-67;
46/ In Marmott's hand, made by him after meeting with Clary. (App. 131)

> "Q. Did you tell Jim Kolker that Fabian could decide which of these alternatives [on the diagram] would be satisfactory?"
>
> "A. No."48/

Ultimately asked by Defendant's Counsel what his understanding of the arrangement reached on December 19 was and how it had operated in the three month's since then, Marmott testified:

> "A. I believe that I have merged with Maryland Lumber and I believe my immediate superior was Fabian Kolker. And I believe that as an operations person what I was supposed to was to do was operate."49/

Marmott and James Kolker met at a McDonald's restaurant in Baltimore in the second week of March to discuss a personnel matter. Since hiring and firing at the Alexandria Yard was at issue, Marmott gave Kolker 50/ a copy of

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48/ App. 121;
49/ App. 124;
50/ App. 88;

the "Minutes" (which contained Marmott's view of what had been agreed to on December 19).

Very shortly thereafter, on March 17, 1982, Marmott was called to Baltimore by James Kolker on the ostensible grounds of discusing the move of the Alexandria Yard, with inventory and equipment, to a larger site.51/ At the outset of this meeting, Marmott gave James Kolker a contract from a customer (Associated Builders) for aproximately $200,000, to be serviced by the merged entity.52/ To Marmott's complete surprise (as Marmott has averred in his affidavit) James Kolker told Marmott that the Agreement of December 19, 1981 was terminated by Maryland Lumber.53/

51/ App. 88-89;
52/ App. 89;
53/ Ibid.

He was handed a document which did not go to the terms of that agreement, but simply stated that Maryland Lumber was closing the Alexandria Yard.54/

While Marmott was at this meeting in Baltimore, Jurkscheit and Ogrzalek went through all of the documents in the office at the Alexandria Yard and, over the protest of former Irene employees there, removed all of them and took them to Baltimore.55/ Because there was doubt as to which part of the inventory at the Yard was Irene inventory (from the period prior to December 18, 1981) and which was Maryland Lumber inventory (for the period thereafter), Marmott kept the entire inventory intact and was unable to use any of it.56/ As Marmott

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54/ App. 68;
55/ App. 89;
56 App. 90;

states in his affidavit, on March 17, 1982 he was left with no business, with no inventory and $49,00 in cash.57/

On the next day (March 18, 1982), Marmott received a telephone call from James Kolker. Marmott took the call in the Yard ofice in Alexandria.58/ Marmott taped that call. That tape was produced and given to Counsel for the Defendant in this case. Marmott in his affidavit identifies portions of the tape, averring that James Kolker stated (in that conversation) the following:

> "I thought that the reason we merged was so that you join forces...you told me that you said I would like to join forces, so I don't have to be the only one, hearing this and I would go away and rest easy and I would like to join your company. See, that was my understanding."59/

57/ App. 90; and the loss of goodwill and identity of his company;
58/ Ibid;
59/ The quoted statement is James Kolker's, precisely as it was taped.

There are numerous statements by James Kolker in that conversation which corroborate Marmott's version of the facts as set forth in his affidavit.60/

Marmott, his wife Irene and Irene Lumber & Supply, Inc. filed suit on November 22, 1982 61/ alleging breach of

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60/ After receipt of that tape during discovery in this case, Defendant James Kolker filed a motion in limine seeking suppression of the tape as being violative of Maryland law. This motion was denied by Magistrate Goetz who ruled that Marmott's taking the tape in Virginia violated no Maryland law. This was affirmed by the Court. Kolker then filed a motion seeking to have the issue of the tape certified by the District Court for a ruling by the Maryland Court of Appeals. The District Court denied the motion. Thereafter Kolker filed a separate action a gainst Marmott in the Baltimore City Court (Case 85137027/CL34869) filed on May 17, 1985, seeking damages from Marmott of $9,999.99 (i.e., below the amount required for removal to federal court) from Marmott for "unlawful and unwarranted invasion of his privacy," and alleging that he (James Kolker) "has been subjected to undue embarrassment, hmiliation and ridicule" by the taking of this tape. That ancillary action brought by the Defendants remains at issue in the Baltimore City Court.

61/ In a diversity action brought under 28 U.S.C. 1332.

the merger agreement by Maryland Lumber, seeking damages for Maryland Lumber's failure to perform the profit-split provision of the merger agreement, and its failure to permit Marmott to exercise his options for Maryland Lumber stock;61A/

Defendant Maryland Lumber filed a motion for summary judgment on March 22, 1985. By order and opinion dated November 4, 1985, the trial court (Norman Ramsey J.) granted Maryland Lumber's motion. The trial court found in rulings pertinent to this Petition that the merger agreement of December 19, 1981 between the parties was insufficiently precise to be enforced and that the merger agreement violated

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61A/ The suit included a count in interference with advantageous relations by Respondent when Petitioner attempted to reopen; that count is not embraced by this Petition.

the "infra annum" provision of the Maryland Statute of Frauds and was, therefore, unenforceable;62/

On Appeal by Marmott from that decision it is essential to note what the Fourth Circuit did rule, and what it did not rule. First, what was before it was not a set of trial findings but a Rule 56 proceeding and record in which all possible inferences of fact had to be deemed in the light most favorable to Marmott -- against whom Summary Judgment was sought. Nonetheless, on that record the Fourth Circuit ruled that what the parties had agreed to (according to Marmott's and Ratick's sworn testimony)"

> "was too vague to be deemed a contract" (Slip Opinion at 9) 63/

62/ The trial Court's opinion is found at App. 28-64. It further held that Section 8-319 of Maryland's Annotated Code requiring a writing in the transfer of securities was violated.

63/ App. 15;

Further the Court ruled that no attempt was made to comply with the statutory merger procedure in Maryland and Virginia (Ibid 10).64/

The nub of the Fourth Circuit's ruling was:

> "Beyond the vagueness in the "Minutes of Special Meeting", as supplemented by the record as a whole, no facts in the case support an inference that the parties manifested their mutual assent to any set of terms. (Ibid, emphasis supplied) 64A/

The Court then proceeded to rule that there was no genuine issue of fact as to whether a contract of merger existed between the parties. Since the Court already ruled that there was insufficient evidence that the:

> "parties manifested their mutual assent to any set of terms." (supra, emphasis supplied)

64/ App. 17;
64A/ App. 19;

the finding that there was no merger agreement may have been relevant but was surplusage in light of the Court's finding that there was no agreement on any terms reached between the parties.

What the Fourth Circuit did not rule on was the Statute of Frauds defenses relied on by the trial court in its opinion:

> "Because we find the agreement to be fatally vague as a matter of law, we do not reach the statute of frauds defense in our holding." 65/

On January 2, 1987 Petitioners filed a timely petition for rehearing. It was denied by the Fourth Circuit on January 30, 1987. 65A/ 66/

65/ App. 16-17; 65A/ App. 27A;
66/ App. The Court did, however, state the following: "We note in passing, however, that a number of courts have refused to apply the provisions of Article 8 of the Uniform Commercial Code to the stock of small, closely-held corporations without a detailed inquiry into the nature of the shares. The essential question is whether the shares are "of a type common dealt in upon securities exchanges"." (See f/note 4 at App. 16). It is uncontested that both Irene and Maryland Lumber were family companies whose stock was not traded.

Argument for Granting the Writ

(a)

It must be stated at the outset that it is unusual for a contract dispute to come before this Court in a petition for a writ of certiorari. These matters are routinely consigned for disposition by the Courts of Appeals and it is rare, as Petitioners recognize, that this Court will choose to focus on an issue of this sort.

But there is one issue in this contract dispute which is unique to it. The Fourth Circuit decided that there was no contract between these parties for it to enforce. It made that ruling and went no farther.

The unique issue in this case is that there was no contract before either the trial court or the Fourth Circuit for one very simple reason: Fabian Kolker, acting for both parties on

December 19, 1981 (the merging company, Irene, and the surviving company, Maryland Lumber) was at one time the chief executive officer of the surviving company in the merger, and a lawyer, and promised a layman, Marmott (the president of, Irene, the merging company) to put what had just transpired between the parties that day, December 19, into a written agreement, and then broke that promise.66A/ Kolker also promised to perform all the legal steps necessary to put the agreement into operation, and proceeded to breach that undertaking.66B/ Marmott's layman acceptance of Fabian Kolker's promises and his reliance on them were just as simple. Marmott trusted Kolker. It was that simple.66C/

66A/ See p. 9, supra;
66B/ See p. 10-11, supra;
66C/ See p. 12, supra;

When three months had passed and no agreement was produced by Fabian Kolker (the lawyer), Stephen Marmott (the layman), at the suggestion of the Kolkers, then went to another lawyer,66D/ whose testimony clearly reflected that some agreement between the parties had in fact been reached on December 19.66E/ By the time that Marmott had independent counsel of his own (in the second week of March, 1982, 13 weeks after the December 19, 1981 meeting and Fabian Kolker's promises) the Kolkers had taken a very different view (than they had on December 19) of what had occurred on December 19. Marmott was called to Baltimore and abruptly told that the deal -- any deal -- was off.66F/ Those three months,

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66D/ See p. 18, suspra;
66E/ See p. 19, supra;
66F/ See p. 23-24, supra;

the devastation to Irene, the disruption to its identity and goodwill with customers and suppliers, was immense.

It is absolutely clear on the face of this record that on December 19, 1981, Marmott and the Kolkers reached some agreement. The evidence that this necessarly occurred is set forth in the following paragraph. None of the events described therein could have taken place by accident. They had to flow from an agreement on December 19, 1981 between Marmott and the Kolkers, or none of them would have happened.

These events are 66G/ (and none are contested on this record): 1) Marmott ceased doing business (on December 21, 1981, the first working day after December 19) as Irene and commenced doing business as Maryland Lumber Company of Virginia; 2) As of that date,

66G/ See p. 12-15, supra;

Irene's personnel were put on Maryland Lumber's payroll; 3) Very shortly after December 21 Maryland Lumber sent a fork-lift and truck for use in Irene's Alexandria Yard; 4) As of that date (December 21, 1981) all invoicing of sales from the Alexandria Yard were issued on Maryland Lumber invoices, not Irene's; 5) Substantial inventory was sent by Maryland Lumber from Baltimore for sale at the Alexandria Yard within a week of December 19; 6) As of that date, December 21, 1981, all of the operating expenses of Irene's Alexandria Yard were paid by Maryland Lumber; 7) Within two weeks from December 19, two employees of Maryland Lumber were transferred to Irene's Alexandria Yard;

Were these accidents? Clearly not. There is no explanation for any of these events except the obvious one: that Marmott and the Kolkers reached an

agreement on December 19 at their meeting in the office of the Alexandria Yard.

All of the foregoing facts are wholly uncontested. Accordingly, the following finding of the Fourth Circuit defies sense:

> "Beyond the vagueness in the Minutes of Special Meeting", as supplemented by the record as a whole, no facts in the case support an inference that the parties manifested their mutual assent to any set of terms." (Slip Op. 11, quoted supra) (emphasis supplied) 66H/

We argue here that it was the view of the Fourth Circuit that all of the foregoing facts were accidents -- accidents that book place without:

> "mutual assent to any set of terms."

We submit that this finding makes absolutely no sense and is glaring error.

66H/ App. 19;

It is the cause of this egregious error by the Fourth Circuit that, in this case, is so troublesome and unique.

(b)

The ruling of the Fourth Circuit rests on the absence of any discernible evidence of an agreement between the parties. And that absence rests entirely on the conduct of Fabian Kolker.66I/ If Fabian Kolker had performed as he promised (as Marmott and Ratick both swore) there would have been a written agreement before the trial court and before the Fourth Circuit. That document might not have reflected the agreement of December 19 as Marmott understood it. Whether it did or not is entirely irrelevant. What is relevant is that there would have been some form of agreement before both courts, containing, inter alia, terms that

66I/ See p. 9-11, supra;

obviously had been agreed to (the name of the new Virginia company, who would pay its payroll, where its new equipment would come from, who would invoice, who would provide inventory, who would pay the operating expenses of the Alexandria Yard, where would additional employees come from) viz., all of the terms that were, in fact, performed immediately.66J/ And if that form of written agreement had been in existence, the Fourth Circuit could never have made the finding that it did. It might well have had difficulty with the Maryland Statute of Frauds (discussed below), but it could never have found the parties failed to manifest

> "their mutual assent to any set of terms." (emphasis supplied)

66J/ See p. 15-16, supra;

That finding, however, is the ratio decidendi of the Fourth Circuit opinion.

Petitioners submit that on the basis of the sworn record before both Courts below, Fabian Kolker's promise -- that of a lawyer acting for both parties in merger negotiations, undertaking to write up the agreement that had been reached and his further undertaking to perform all the legal steps necessary to put the agreement into operation -- imposed on Kolker special obligations. It may have occurred in a tiny office in a small lumber yard in Alexandria, but what Fabian Kolker did imposed on him the sanctions of Rule 1.7 (b) of the Model Rules of Professional Conduct:

> "(b)A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

> "(1)the lawyer reasonably believes the representation will not be adversely affected, and (2)the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."67

The full facts of Fabian Kolker's conduct were spread before both courts below, and his conflict of interest at the December 19 meeting made explicitly clear.67A/ Rule 1.7(b) was not cited to

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67/ Model Rules of Professional Conduct of the American Bar Association, 1987, Rule 1.7(b);

67A/ An entire section of Marmott's Brief to the Fourth Circuit argued that Maryland Lumber was estopped from utilizing Fabian Kolker's breach to raise a Statute of Frauds defense out of the absence of a written agreement. Kolker's conflict of interest and Marmott's reliance on Kolker's promise to produce a writing is specifically set forth in that section. Those facts were clearly before the Fourth Circuit. It ignored them.

either Court because the conflict appeared so clearly. Rule 1.7(b)(2) was violated, to Marmott's prejudice, when the "explanation of the implications" called for by that canon and the "advantages and risks" (again called for by the Canon) were not explained to Marmott. Maryland requires, under these circumstances:

> "Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller" (in a buyer-seller conflict) but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel. The full significance of the representation of conflicting interests should be disclosed to the client so that he may make an intelligent decision before giving his consent." (Crest Investment Inc. v. Comstock, 327 A2d 891, at 905)

None of these disclosures were made to Marmott on December 19, 1981. Marmott

could conceivably have ignored them. When the written agreement was produced by Fabian Kolker (which never occurred) Marmott could conceivably then have consulted independent counsel. When he, in fact, did, it was too late.68/ Notwithstanding any of the foregoing, Marmott was entitled to have disclosed to him (a layman) Fabian Kolker's dual representation of Maryland Lumber when Kolker undertook to put the December 19 agreement into writing and undertook to "handle the legal things". That disclosure was not made by Kolker, nor were its implications, as both the Canon and Maryland law require. Often the prejudice flowing from the violation of

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68/ The Kolkers broke off all relations with Marmott on March 17, 1982, permitting no time for Clary (Marmott's own lawyer, seen by Marmott's in the second week of March) to negotiate any form of agreement.

a Canon of practice is speculative. But not here. Fabian Kolker's interest, adverse to Marmott, and his failure to disclose that fact to Marmott put Kolker in a position where he was able to prevent the execution of a written agreement, and thence in the position to argue to two courts that no agreement had ever been reached. And it is obvious that the Fourth Circuit bought that argument and threw Marmott out of Court when it did.

The timing of Fabian Kolker's breach is crucial. He failed to produce a written agreement from December 19, 1981 (when he made the promise to do so) until the second week in March, 1982.68A/ In plain terms, the absence

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68A/ When Marmott tendered to James Kolker the "Minutes of Special Meeting"; See p. 22-23, supra;

of a written agreement during those crucial 11 weeks (after December 19) put Marmott in the position of working with no agreement -- working at the sufferance of the Kolkers -- who were able to sit and observe Marmott's performance and decide whether or not to proceed with the December 19 agreement. That is a perfectly plausible business arrangement for the Kolkers to be in. But it is not the arrangement that Fabian Kolker agreed to; Fabian Kolker used his status as a lawyer to delay any written document reflecting what he agreed to on December 19; Marmott a layman, was not warned of Kolker's conflict of interest when Kolker undertook it; Marmott relied on Kolker's dual representation. Three years later Kolker's dual representation, and his

use of it, enabled Kolker to argue that there was no December 19 agreement. And a trial Court and the Fourth Circuit accepted that argument.

If one makes the assumption that the "Minutes of Special Meeting" were wildly inaccurate, giving Marmott far better terms than actually agreed to on December 19, Fabian Kolker's conduct is in no way excused. Because even if this were so, there would be the "Minutes" reflecting what Marmott believed the agreement to be, and Kolker's document reflecting what he believed the agreement to be. The trial court would be faced with a classic issue of fact. Summary judgment for either party would be clearly impossible. Kolker engineered the crucial post-December 19 posture between the parties so that this

would not occur. And he has been sucessful in this effort to this date.

What happened in Marmott involves highly questionable conduct of an attorney positioned squarely in the middle of a conflict of interest. His use of that conflict to prejudice a layman, Marmott, is manifest.68AA/ It is the combination of this conflict and this prejudice that makes this case an appropriate case for this Court to hear on this issue. The supervisory function of this Court over counsel is

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68AA/ The Fourth Circuit made the point that Maryland statutory merger procedures were not complied with in this case. (App. 17). Fabian Kolker told Marmott on December 19 that:

> "he was going to handle the legal things" (App. 106-107)

If that statement by a lawyer to a layman does not include compliance with a state's statutory merger procedures, no language does. The Fourth Circuit absolved Kolker's non-compliance with the Maryland Securities law by stating in dicta that it was doubtful whether it applied to the stock transfer in this case. See footnote 66, supra.

historic.68B/ It is this function that is called into play in this case. This issue, outlined above, makes this case, Marmott, very different from the ordinary contract dispute.

(c)

Briefly, the Fourth Circuit committed separate error of a very different kind in its December 22 opinion. This case came to that Court

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68B/ Wood et al. v. Georgia, 450 U.S. 261, 101 S. Ct. 1097, 67 L.Ed. 221 (dealing with counsel's conflict of interest as raising a due process issue); Roadway Express, Inc. v. Piper, 447 U.S. 752, articulating the inherent power of the Court to police conduct of counsel found in bad faith, (at 766: "The power of a Court over members of its bar is at least as great as its authority over litigants"): Schroeder v. Young, 161 U.S. 334, 16 S. Ct. 512 (counsel's conflict in a land purchase context); See also citations at 68 ALR 3d 167 commenting on Florida Bar v. Teitelman, 216 So. 140 where counsel for buyer and lender improperly prepared "package" of papers for signature and payment therefor by seller without disclosure of his dual capacity and his adverse interest.

on a Rule 56 record; there was no trial below. All of the events recited in the preceding section 69/ which took place within two weeks of December 19 occurred; Respondents have never denied that fact. Of the nine terms found in the "Minutes", six were completely performed by Marmott within two weeks of December 19.69A/

As the Fourth Circuit veered back and forth between vagueness findings as they applied to Marmott's stock options 69B/ and the finding that:

69/ See pages 7-12, supra; It is noteworthy that all of Marmott's suppliers and customers commenced dealing with a totally new and different entity, Maryland Lumber, on December 21, 1981;
69A/ See p. 10, supra;
69B/ App. 18;

> "Marmott is essentially asking the Court to make this contract for the parties."69BB/

and

> "no facts in the case support an inference that the parties menifested their mutual assent to any set of terms."69C/

the reader is left baffled as to whether the Court found no agreement on stock options or no agreement on anything. What apparently transpired was the emergence of a real dilemma: if the Court recognized some agreement between the parties (covering those terms which concededly were performed) logic would have forced the Court to recognize Marmott's version of the profit-split and stock option provisons because the Court's acknowledgement of an agreement could not be separated -- in a Rule 56

69BB/ App. 19;
69C/ Ibid;

proceeding -- from the non-movant's sworn view of all of its provisions. That, the Court below was not prepared to allow. Therefore, in defiance of uncontested facts before it in the record, the Court held that there was no agreement of any kind, covering any terms, between Marmott and the Kolkers. If facts in a record mean anything, that finding of the Fourth Circuit (and it is quoted from two portions of the opinion, above) is wholesale error.

(d)

All of the Federal Rules of Civil Procedure are creatures of this Court. This Court is the final authority on what each rule means and how it applies. Petitioners are, again, aware that routine disputes on the application of Rule 56 (or any other Rule) do not

belong before this Court. But what occurred before the Fourth Circuit in Marmott is sufficiently singular, an aberration so striking, that the future of Rule 56 before that Court may be affected if its ruling is allowed to stand. This is true for two reasons.

Recourse to genesis commentary on Rule 56 is the beginning of what went wrong. We repeat what must be a truism to this court:

> "On summary judgment the inference to be drawn from the underlying facts...must be viewed in the light most favorable to the party opposing the motion." (Moore, Federal Practice, Volume 6, Part 2, at 56-105.

and another universally understood Rule 56 principle dealing with appellate review of decisions under that rule:

> "The trial Court should resolve all reasonable doubts, touching the existence of a genuine issue as to a

> material fact against the moving party, and a judgment granted in violation of those principles is subject to reversal by the appellate court unless the judgment is correct for some other reason." (Ibid, 56-1557)

This Court has stated it succinctly:

> "For the purposes of ruling on the pending motion; (for summary judgment) "plaintiffs allegations are to be taken as true", Jenkins v. McKeithen, 395 U.S. 421-422, (1969)

Next, the issue before the Fourth Circuit that these rules must be applied to is found at page 12 of the slip opinion:

> "In sum, the pleadings, affidavits,and depositions, taken as a whole, show that there is no genuine issue as to whether a contract existed to merge Irene Lumber and Maryland Lumber. The simple phrase "shall be merged" is, by itself, too meager a basis for binding parties contractually. When read together in this case with the evidence that a joint venture, rather than a statutory merger, might have been contemplated, the vagueness of the agreement is

> greatly increased. The imprecision is further heightened when the agreement, as here, has an integral part -- the stock option -- that lacks clear price and quantity terms. Together these flaws are sufficient to support summary judgment against Marmott." 70/

What the Fourth Circuit was addressing was a document proffered by Marmott, the "Minutes of Special Meeting."70A/ How it originated, and the fact that it was written contemporaneously with the events of December 19 is set forth in the Statement of Facts, supra. Marmott and his father-in-law (both present at the December 19 meeting in the Alexandria Yard with the Kolkers) swore that the "Minutes" were an accurate description of what occurred at that meeting. On the issue posed before the Fourth Circuit ("whether a contract

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70/ App. 20-21;
70A/ App. 64-66;

existed to merge Irene Lumber and Maryland Lumber"),[70B] each of the paragraphs of the "Minutes" are relevant. The first states:

> "First: Irene Lumber & Supply, Inc. is to be merged with and become an integral part of Maryland Lumber Co. Inc., under a new name that shall be determined at a future time. The merger is to become effective on December 21, 1981 and the facility at 217 South Henry Street, Alexandria, shall become a division of Maryland Lumber Co. Inc., Baltimore, Maryland."

One needs no degree from a law school or from the Wharton School of Commerce to understand those words. Nor is any special expertise required to understand paragraph Second (the assumption of Irene's bills by Maryland Lumber), or Third (an inventory mix for the Alexandria yard is to be supplied by Maryland Lumber on Marmott's request), or Fourth (a separate accounting system

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70B/ App. 20;
70C/ App. 65;

to be established for the Alexandria division), or Fifth (all checks issued of Alexandria were to bear Marmott's and James Kolker's signature), or Sixth (Maryland Lumber is to bear the expenses of the Alexandria Yard), or Seventh (Maryland Lumber shall initially provide trucks and fork-lifts for the Alexandria Yard), or Eighth (net profit generated by the Alexandria Yard is to be divided between Marmott and James Kolker, 50-50), or Ninth (Marmott is to receive options to purchase Maryland Lumber stock in an amount and at a price to be determined not later than January 1, 1983).70D/

That agreement is as plain and clear as any businessman could produce when his small business is to be merged into

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70D/ All are paragraphs of the "Minutes", sworn to by Marmott and Ratick as accurately recording the agreement of December 19, 1981; See App. 64-67;

a larger company. That this was the agreement that the Kolkers entered with Marmott on December 19 was sworn to not alone by Marmott but also by his father-in-law, Ratick. Perhaps the least explicit provision is the stock option provision in Paragraph Ninth. But as to it, the following details are significant, but even more so is the source from whence they come:

> "Plaintiffs claim that pursuant to the terms of the unwritten agreement to merge, Stephen Marmott was to receive fifty percent (50%) of the profits generated by the Alexandria facility and an option to purchase Maryland Lumber's stock at a price to be subsequently determined by the parties. (App. 261) In his deposition Marmott testified that under the terms of the agreement made on December 19, 1981, he would be entitled to purchase "up to ten percent (10%)" of Maryland Lumber's stock. The exact percentage of stock to which the option would apply was to be determined by comparing the profits generated by the Alexandria facility in its first year of operation to the total value of Maryland Lumber's stock (App. 189-192). Marmott went on to

> explain at two different points in his deposition that the measuring year by which such profits were to be calculated was to be the 1982 calendar year." 70A/

That statement is not Marmott's, nor is it from a Marmott brief. It is taken directly out of Maryland Lumber's brief to the Fourth Circuit, at pages 24-25 thereof. It cites as support Marmott's testimony in the Joint Appendix before that Court.70B/ Again, one need be no economic seer to understand that language. And it comes from a source that is unimpeachable: Marmott's adversary.

That explanation of the stock option provision in Paragraph Ninth must be put alongside the Fourth Circuit's finding:

70A/ Maryland Lumber's Brief to the Fourth Circuit at 24, 25 (App. 129-130);
70B/ Respondent Maryland Lumber met itself coming back. It was trying to prove its "infra annum" point with this passasge. But its words are very plain;

> "The imprecision is further heightened when the agreement, as here, has an integral part -- the stock option -- that lacks clear price and quantity terms." 71/

The Fourth Circuit simply neglected to read Maryland Lumber's brief. Under Rule 56 an inference is permissible -- indeed mandated -- that Marmott was entitled to utilize his 50% of the Alexandria Yard's profit to purchase up to 10% of Maryland Lumber's stock, with the exact amount of stock to be determined by the ratio of the Alexandria Yard's net profit to the overall net worth of Maryland Lumber. Even lawyers should be able to comprehend that concept.

Every provision of the "Minutes" and the portion of Maryland Lumber's brief, quoted supra, are quite clear.

71/ App. 21;

Any businessman, anywhere, could understand all of these provisions and would recognize them as a wholly adequate merger agreement between two businessmen who were merging a small lumber yard into a larger one.

The "Minutes" were entitled to an inference from the trial court and from the Fourth Circuit that they accurately reflected what occured on December 19. With that inference -- and the admission from Maryland Lumber's own brief -- the Fourth Circuit's finding that:

> "The parties' Agreement was too vague to be deemed a contract"71A/

loses all reason.

Still, lack of reason alone is no basis for this Court's intervention. What is more troublesome, however, is that the Fourth Circuit's opinion went well beyond ordinary lack of reason:

71A/ App. 15;

> "The Kolkers' strong disagreement with Marmott's version of the "merger" was evidenced by their quick move to terminate the arrangement entirely when presented with Marmott's "Minutes." Nothing in their actions suggested that the Kolkers assented to a merger of their company with Irene Lumber." 71A/

That is a classic trial finding of fact by a Court or jury. It is the Fourth Circuit's finding of fact that it accepted the Kolkers' version of what transpired on December 19 and it necessarily constitutes a rejection of the truth of the "Minutes".71B/ The entire passage (quoted above) has no place in a Rule 56 proceeding. Whether the Kolkers assented to the "Minutes" was for a jury to decide. Yet that

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71A/ App. 19-20;
71B/ It is what Marmott (the non-movant) swears to and the inferences to be drawn from his averments--that are relevant in a Rule 56 proceeding. What the Kolkers did or said in dispute of these averments is for the finder of fact to weigh.

passage and the unmistakeable determination of fact found it it pervades the entire opinion.

Rule 56 covers a multitude of sins. Some are harmless. This one is not. Taken with the other vagaries of the court below in Marmott, it deserves this Court's attention. The Fourth Circuit acted as no other Court in the land has, making obvious findings of fact on disputed issues in a Rule 56 proceeding.

(e)

With that record before it, the Fourth Circuit was faced with a classic issue of fact: Did the "Minutes" and Marmott's (and Ratick's) testimony reflect the agreement reached between the parties on December 19, or did the parties reach some other agreement? The record never makes quite clear what the

other agreement was -- in the eyes of the Kolkers. But the Fourth Circuit was absolutely correct on one point: the Kolkers, when they decided to act, made it clear that they did not accept Marmott's version of what transpired on December 19.

There is little need to recite to this Court precedents articulating that issues of fact precluding summary judgment include (1) the existence of a contract between parties one of whom disputes the existence of a contract while the other swears to its existence, and (2) the terms of that contract when the parties dispute what they were. Specimen cases among the plethora of precedents are: Ozark Milling Co. v. Allied Mills, 480 F2d 1015, Aronson v. Arakelian, Inc., 154 F2d 231; Ore & Chemical

Corp. v. Howard Butcher Trading Corp., 455 F. Supp. 1150; Pollock v. Welcome Wagon International, Inc., 199 F. Supp. 8; Charbonnages de France v. Smith, 597 F2d 406.

Given the exclusion by the Fourth Circuit of all other issues in their December 22 opinion, the foregoing two issues of fact loom inescapably out of the record in this case vitiating the validity of the summary judgment affirmed by that Court.

(f)

The Maryland "infra annum"[71C/] provision of its Statute of Frauds is very much in this case notwithstanding its avoidance by the Fourth Circuit. It is necessary to demonstrate that if the Fourth Circuit had investigated that issue, it could not have found the agreement between the parties in this case covered by that provision.

71C/ Maryland Annotated Code, Article 39C, Section 1, (1982 Repl. Vol.)

(i)

Maryland law is quite clear that if an oral agreement:

> "by any possibility be fulfilled or completed in the space of a year although the parties may have intended its operation to extend to a much longer period."

the oral agreement falls outside the "infra annum" clause, Campbell v. Burnett, 120 Md. 214, 76 A2d 894 (quoted above). If the understanding of the parties (as reflected in the "Minutes of Special Meeting") had stated, e.g., that Marmott's entitlement was to be measured "on January 1, 1983", or to be measured "only after one full year of performance as measured on January 1, 1983", the "infra annum" clause would apply. But that is not the language of the Minutes. They make January 1, 1983, the latest

measuring date of Marmott's entitlement, plainly opening the possibility of measurement of it within a year of December 19, 1981. A very recent Maryland case, Griffith v. One Investment Plaza, 488 A2d 182, is even clearer on this point, ruling that oral agreements which are not "expressly and specifically" to be performed after a complete year fall outside the clause. Corbin on Contracts is cited, stating that the parties' expectation is not the test but rather:

> "A provision in the contract fixing a maximum period in which performance is to be completed, even though that period is much in excess of one year, does not make the statute applicable." (Corbin on Contracts, Section 444 at 535 (1950), cited at 182 488 A2d 185)

The language of Paragraph Ninth of the "Minutes" places it squarely within that exception.

(ii)

As noted, Marmott's performance of the terms of the December 19 agreement between the parties was immediate. Corbin states:

> "If the performance required of the Plaintiff has been fully performed by him within one year, the great weight of authority holds that the statute has thereby been made inapplicable and the Defendant's promise is enforceable just as if it were in writing. This is so, whether performance rendered was required to be completed within one year. (Corbin on Contracts, Volume 2, Section 457, p. 575-576)

The Restatement of Contracts accepts this view: Restatement of Contracts, Section 198, comment (a). Thus a second reason why the "infra annum" clause of the Maryland statute is clear.72/ 72A/

72/ The enforceability of an oral agreement to put a broader oral agreement into writing (when this is one

(iii)

In Kline v. Lightman, 221 A2d 675 at 684, the Maryland Court of Appeals ruled that inequitable conduct estops those guilty of this conduct from raising the

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f/notes 72/ and 72A/ cont'd:

term of the agreement) is disputed by Williston on Contracts, Section 524 A) which holds that it is not within the statute, and Corbin, which holds that it is (Corbin, Section 238)

72A/ There is evidence in this record linking Marmott's performance to his sworn version of the events of December 19. On December 24 Marmott drew his first advance against his share of the Alexandria Yard's profits. It came in the form of a Maryland Lumber check for $600, which Marmott and his wife endorsed as follows:

> "first pay check for agreement of merger between Jim Kolker and Fabian and Fabian Kolker in al agree to pay 50% of profits of Virginia branch and ownership in Maryland Lumber Company of Baltimore and VA" (App. 132)

The check was cashed and returned to and kept by Maryland Lumber. It is rough but clear evidence of Marmott's view of what had occurred five days earlier. When the check was returned to Maryland Lumber, that company made no response or protest to Marmott;

defense of the Statute of Frauds. Such an estoppel is entirely appropriate under the facts sworn to in the Marmott and Ratick affidavits; Petitioners Marmott and Irene relied on Fabian Kolker to produce the written agreement reflecting the December 19 Agreement; he failed to do so; Defendants then sought to utilize his failure to prevent enforcement (under the "infra annum" provision of the Maryland Statute of Frauds) of the December 19 agreement by the plaintiffs. This is precisely the bootstrapping that was proscribed by the Kline case.

(g)

At the outset petitioners told this Court that an ordinary contract dispute does not belong here. Marmott is far from ordinary. It involves conduct in

violation of the canons by an attorney who was also a party and who utilized the obvious conflict of interests in which he was situated to create an argument which deprived the lay person for whom he was acting 73/ of that lay person's day in Court. We need not tell this Court how monumentally different the outcome below would have been if Kolker had performed as he promised; if he had given Marmott a written agreement containing the provisions agreed to orally by the parties on December 19. The entire rationale of the Fourth Circuit opinion would disappear. The impact of what Kolker did, its ultimate result before two courts, deserves the attention of this court.

Moreover, Rule 56 was not observed by the Fourth Circuit, The inferences

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73/ for whom he was "to handle the legal things" (App. 107);

to which these plaintiffs were entitled under the Rule were ignored. In consequence, that Court was then able to ignore the issue of fact that leaps forth out of this record: did the events of December 19 occur as Marmott swears they did, or as the Kolkers maintain they did. It took considerable doing for the Court to avoid that issue; its opinion of December 22 is, however, indeed, a tour de force. It sets the Fourth Circuit entirely apart from every other circuit in the manner in which Rule 56 is enforced.

Petitioners submit its opinion and judgment in Marmott deserve review by this Court.

Respectfully submitted,

Joseph H. Sharlitt
Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 85-2344(L)

STEPHEN MARMOTT,
IRENE LUMBER AND SUPPLY, INC.
(A Virginia corporation)

Appellants,

versus

Maryland Lumber Company
(a Maryland corporation);
Milling, Drying and Treating, Inc.
(a Maryland corporation);
James Kolker, Fabian Kolker,

Appellees.

NO. 86-3950

STEPHEN MARMOTT,
IRENE LUMBER AND SUPPLY, INC.
(A Virginia corporation)

Appellants,

versus

Maryland Lumber Company
(a Maryland corporation);
Milling, Drying and Treating, Inc.
(a Maryland corporation);
James Kolker, Fabian Kolker,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (C/A 83-4016).

Argued: October 8, 1986
Decided: December 22, 1986

Before ERVIN, CHAPMAN and WILKINS, Circuit Judges.

Joseph H. Sharlitt (Daniel H. Twomey; Jessey & Hessey on brief) for appellants; Glen M. Cooper (Keith A. Minoff; Paley, Rothman & Cooper; Alan I. Baron; Finley, Kumble, Wagner, Heine, Underberg, Manley & Casses on brief) for appellees.

ERVIN, Circuit Judge:

This is an appeal from summary judgment in a case involving an aborted "merger" of two closely-held lumber companies. Plaintiff-appellants Stephen Marmott, his wife Irene Marmott, and their company, Irene Lumber and Supply co., Inc (hereafter referrd to collectively as "Marmott"), brought suit against James and Fabian Kolker, their company, Maryland Lumber Co., and a subsidiary of Maryland Lumber called Milling, Drying and Treating, Inc. (collectively hereafter "the Kolkers") over an alleged merger agreement reached in a meeting on December 19, 1981. Marmott claims that the parties agreed to merge and that Fabian Kolker agreed to memorialize the merger and handle the necessary legal details, but that he Kolkers never produced the written agree-

ment and instead breached the contract in March, 1982.

The District Court for the District of Maryland entered summary judgment against Marmott on December 9, 1985. The court found that the purported contract was fatally vague as a matter of Maryland law;[1] that its enforcement was barred by the statute of limitations; and that Marmott's other claims, which had both common-law and statutory components,[2] were

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1 The magistrate in the case recommended that Maryland law control all state-law aspects of the case, and the parties have not contested that choice of law.

2 The common-law actions were for intentional interference with business relations and defamation; the statutury action was brought under Va. Code § 18.2-499 (1980), which proscribes conspiracies to injure the trade, business or profession of another.

inadequate as a matter of law. We conclude that the district court was correct in finding that no contract existed and that the Marmott claim for interference with business relations fails. On those grounds, we affirm the summary judgment below.

I.

In 1981, Irene Lumber was a small, recently-started wholesale lumberyard located in Alexandria, Virginia. Its inventory of lumber and building supplies was worth a few thousand dollars. Stephen Marmott founded it and generally made its business decisions. He and his wife owned over seventy percent of the stock; the remainder was owned by his wife's parents. Stephen Marmott was apparently an experienced lumberyard manager, claiming

for himself over fifteen years as principal operating officer of a New York City lumber company and a Florida retail lumber company.

Maryland Lumber, headquartered in Baltimore, was founded by Fabian Kolker's father in 1908. It had a much larger inventory and staff than did Irene Lumber. At the times involved in this case, it was owned equally by Fabian and his brother, M. Budd Kolker. Fabian was the president. He son, James, had been involved in company management for eight years. James, however, owned no stock and was not on the board of directors.

From June until the problematic meeting in December, 1981, Marmott operated in a distributorship arrangement with the Kolkers. Irene Lumber would solicit sales and place orders with

Milling, Drying and Treating, the Maryland Lumber subsidiary. Milling, Drying, and Treating did the bookkeeping and billing and paid a commission to Marmott. Both parties felt dissatisfied with the arrangement, so a meeting was called for December 19. The crux of this dispute concerns the nature of the new relationship, if any, agreed upon at that meeting.

Marmott claims that, at this meeting he reached an oral agreement with fabian and James Kolker to "merge" their businesses. The terms of this ostensible merger gave Marmott an option to purchase up to ten percent of the stock of Maryland Lumber at the end of 1982. Marmott suggested in a deposition that he was entitled eventually to purchase up to fifty percent of Maryland Lumber's stock.

The price was to be agreed on later, based on the relative financial performance of the Kolkers in Maryland and Marmott in Virginia during the 1982 calendar year. Marmott further claimed that he was to receive a share of profits in the merge entity worth approximately $250,000 a year. He maintained that Fabian Kolker agreed at the meeting to put all of this into writing. That step was never taken.

In defense of his understanding of the meeting's import, Marmott produced a document labeled "Minutes of Special Meeting" (hereinafter occasionally referred to as "Minutes") which outlines, in nine short paragraphs, some features of a merger between Maryland Lumber and Irene Lumber. The "Minutes" were based on notes made by Stephen Marmott's father-in-law, who had also attended the meeting. They

were typed by Stephen Marmott's mother-in-law sometime after the meeting. They were not shown to the Kolkers, however, until the following March.

In the meantime, Marmott made some changes in his business immediately after the December 19 meeting: he began answering the telephone as "Maryland Lumber of Virginia" rather than "Irene Lumber & Supply"; he began to be paid directly by Maryland Lumber; and he received employees, equipment, and a substantial amount of inventory from the Kolkers. Maryland Lumber paid Marmott a salary of $600 per week, later converted to a $600 draw against commissions. Marmott styles this and his other actions after the December 19 meeting as partial or full performance of the merger

agreement. The Kolkers point out that these actions are just as consistent with an agreement on their part to hire Marmott as a Maryland Lumber employee, which is essentially the outcome they attribute to the December 19 meeting.

During this time, Irene Lumber & Supply Co. continued to exist as a legal authority. No notices, still less articles merger,[3] were filed with any government authorities. No leases were

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3 Maryland, like every other state in this circuit, has a statutory procedure for corporate mergers. It requires, among other things, that articles of merger be filed with the proper governmental authorities before a merger is effective. See Md. Corps. & Ass'ns Code Ann. § 3-107 (1985). Any putative merger would be legally unenforceable unless and until the statutory requirements were satisfied. Cf. Prince George's Country Club v. Edward R. Carr, Inc., 235 Md. 591, 202 A.2d 354 (1964) (statutory requirements must be met to effect a sale of all assets.

assigned; none of Marmott's equipment was transferred to Maryland Lumber.

In early March, Stephen Marmott inquired about changing Irene Lumber's telephone listing to Maryland Lumber, and an employee of the telephone company informed him that certain legal papers were needed to make such a change. At the suggestion of James Kolker, Marmott went to a local attorney to have the necessary papers drawn up. The attorney was unsure, on the basis of the "Minutes of Special Meeting," how the parties desired to structure the "merger." He advised Marmott about the differences between a joint venture and a merger and asked Marmott to inquire to the Kolkers what exactly they had envisioned on December 19. Marmott thereupon sent a piece of paper with two columns, one labeled "Joint

Venture" and the other labeled "Merger," to the Kolkers. When he received this paper, James Kolker called Stephen Marmott to a meeting in Baltimore.

At this meeting, on March 13, 1982, Marmott showed the "Minutes" to the Kolkers for the first time. James Kolker informed Marmott that the "Minutes" did not represent the arrangement that they had discussed. Four days later, the Kolkers removed all their documents from the Alexandria lumberyard, notified Stephen Marmott that his employment was terminated, and attempted to remove their inventory. Marmott refused to give up the inventory until the Circuit Court of the City of Alexandria issued an order, on October 22, 1982, declaring the Kolkers' right of replevin for the lumber. Marmott

alleges that, meanwhile, the Kolkers were calling some of his customers and telling them not to buy supplies from him, saying that his lumber was stolen. This allegation forms the basis of Marmott's claim for interference with business relations.

II.

We review the events of the December 19, 1981 meeting and the problems that subsequently arose mindful of the well-established principles of summary judgment. See generally Ross v. Communications Sattelite Corp., 759 F.2d 355, 364 (4th Cir. 1985). In particular, the facts and inferences to be drawn from the facts must be viewed in the light most favorable to Marmott, as the party opposing the summary judgment motion. See United States v. Diebold, 369 U.S. 654,

655 (1962). But settled principles of contract law and state requirements for consummating mergers limit the range of possible inferences that can be drawn from Marmott's allegations. Cf. First National Bank of Arizona v. Cities Service Cop., 391 U.S. 253, 180 (1968) (antitrust case). Although disputes about contract formation most often raise issues to be resolved by a factfinder, rather than on summary judgment, see Charbonnages de France v. Smith, 597 F.2d 406, 414-15 (4th Cir. 1979), in this case the facts as pleased by Marmott and supplemented by the exhibits before the district court clearly eviscerate Marmott's claim that a merger agreement existed. The record, taken as a whole, demonstrates that a rational trier of facts could not find for Marmott. See

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 54 U.S.L.W. 4319, 4322 (U.S. March 26, 1986), rev'g 723 F.2d 238 (3rd Cir. 1983).

The parties' agreement was too vague to be deemed a contract. It is a well-settled tenet of Maryland law that a verbal or written agreement is not valid unless "the parties express themselves in such terms that it can be ascertained to a reasonable degree of certainty what the agreement meant. If the agreement is so vague and definite that it is not possible to collect from it the full intention of the parties, it is void." Strickler Engineering Corp. v. Seminar, Inc., 210 Md. 93, 122 A.2d 563, 568 (1956) (collecting cases).

The "Minutes" state only that Irene lumber "is to be merged with and become an

integral part of Maryland Lumber . . . under a new name that shall be determined at a future time." Marmott contends that the pattern of business conducted immediately after the December 19 meeting constitute both evidence of the intended structure of the "merger" and partial performance of the contract.[4] The

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[4] The partial performance issue was raised in response to the Kolkers' invocation of the statute of frauds defense. The district court found the agreement subject to the Maryland infra annum statute of frauds, see Md. An. Code Art. 39C, § 1(3) (1982), because Marmott's share in the alleged stock option agreement was to be calculated based on the next calendar year's profits. The district court also held that the agreement was subject to the special statute of frauds in Article 8 of the Maryland Commercial Code, see Md. Com. Law Code Ann. § 8-319 (1975). Because we find the agreement to be fatally vague as a matter of law, we do not reach the statute of frauds defense in our holding. We note in passing, however, that a number of courts have refused to apply the provisions of

inference is much stronger that nothing aproximating a merger occurred. Cf. Cities Service Co., 391 U.S. at 280 (finding inferences urged by movant more probable than those urged by party opposing a summary judgment motion in antitrust case). Irene Lumber kept its corporate existence throughout these events. No attempt was made to comply with the statutory merger procedure in either Maryland or Virginia. Stephen Marmott was never paid according to the

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Article 8 of the Uniform Commercial Code to the stock of small, closely-held corporations without a detailed inquiry into the nature of the shares. The essential question is whether the shares are "of a type commonly dealt in upon securities exchanges. . . . " Id. §8-102. See Zamore v. Whitten, 395 A.2d 435 (Me. 1978); Gulf Mortgage and Realty Investments v. Alten, 282 Pa. Super. 230, 422 A.2d 1090 (Pa. Super. 1981); Kenney v. Porter, 557 S.W.2d 589 (Tex. Civ. App. 1977).

terms of the "Minutes of Special Meeting."

The claimed stock option agreement was also imprecise. The "Minutes" state only that Marmott' shall be given options to purchase stock in maryland Lumber . . . in an amount and at a price to be determined, not later than January 1, 1983." Marmott sought to make up for the obviously insufficient detail in that provision by setting out a formula for the stock option in an affidavit. In his deposition, however, Stephen Marmott phrased the formula in several slightly, but significantly, different ways. The district court properly concluded that the stock option agreement was unenforceable.

In view of the ambiguity in the structure of the "merged" entity, ambiguity that is heightened by Marmott's uncertainty whether he had agreed on a

joint venture or a merger, and further given the uncertainty in the putatuve stock option agreement, which Marmott stated was integral to the deal, Marmott is essentially asking the court to make this contract for the parties. Maryland courts have steadfastly refused to do this. See e.g., Robinson v. Gardner, 196 Md. 213, 76 A.2d 354 (1950).

Beyond the vagueness in the "Minutes of Special meeting," as supplemented by the records as a whole, no facts in the case support an inference that the parties manifested their mutual assent to any set of terms. It is essential that the minds of the parties be in agreement on terms in order for a contract to be established. See e.g., Klein v. Weiss,, 284 Md. 36, 395 A.2d 126, 141 (1978). The Kolkers' strong

disagreement with Marmott's version of the "merger" was evidenced by their quick move to terminate the arrangement entirely when presented with Marmott's "Minutes." Nothing in their actions suggested that the Kolkers assented to a merger of their company with Irene Lumber. In fact, such assent was improbable given the size and age of Maryland Lumber in contrast with the start-up nature of Irene Lumber, which had subsisted for the seven months of its corporate life as a distributor for Maryland Lumber.

In sum, the pleadings, affidavits, and depositions, taken as a whole, show that there is no genuine issue as to whether a contract existed to merge Irene Lumber and Maryland Lumber. The simple phrase "shall be merged" is, by itself, too meager a basis for binding parties

contractually. When read together in this case with the evidence that a joint venture, rather than a statutory merger, might have been contemplated, the vagueness of the agreement is greatly increased. The inprecision is further heightened when the agreement, as here, has an integral part - the stock option - that lacks clear price and quantity terms. Together these flaws are sufficient to support summary judgment against Marmott.

III.

The district court held that Marmott's claims based on common-law interference with business relations and defamation were barred by Maryland's one-year statute of limitations applicable to actions for libel

and slander.[5] The court also rejected a claim based on § 18.2-499 of the Virginia Code,[6] which provides that a civil aciton may be brought for conspiracy to interfere with a business. The court rejected this statutory claim on two grounds. First, the court held that the conspiracy claim was time-barred, becaue the underlying cuse of action was the same one barrred by the one-year limitations period for libel and slander. The court reasoned that the form of action should not change the relevant limitations period and that the one-year period should control. Second, the court found that Marmott failed to allege a conspiracy, as required by the

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5 See Md. Cts. & Jud. Proc. Code Ann. § 5-105 (1984).

6 Va. Code § 18.2-499 (1980).

statute because the complaint named only the Kolkers and their company as conspirators. The law is well-settled, and indeed Marmott agrees, that a conspriracy between a corporatin and its agents, acting within the scope of their employment, is a legal impossibility. See e.g., Nelson Radio and Supply Co. v. Motorola, 200 F. 2d 911, 914 (5th Cir. 1952).

Marmott has not contested the judgement on the common-law claims. On the statutory claim, however, Marmott argues that the one-year limitations period is inappropriate and that the clair is against the Kolkers as individuals as well as agents of maryland Lumber. Further, Marmott argues that subsection (b) of § 18.2-499 does not require proof of a conspiracy.

We agree that the district court wrongly applied a one-year limitations period to § 18.2-499. That section has previously been held to have a five-year statute of limitations, because it creates an action that would survive a plaintiff's death at common law. See Federated Graphics Cos. v. Napotnik, 424 F.Supp. 291, 294 (E.D. Va. 1976). The cases relied on by the court for its reduction of the period to one year involved multiple claims based on common-law forms of action with different limitations periods. When a special statutory cause of action and a common-law cause of action co-exist, and the statutory cause of action has a longer limitations period, the statutory period should prevail. See 51 Am Jur. 2d, Limitations of Actions § 62, n.2 (1970).

The case cited by the court for the linchpin proposition that no common law slander claim exists under § 18.2-499 actually distinguishes "personal" from "trade" injuries and suggests that the latter is a valid claim under the statute. See Moree v. Allied Chemical Corp., 480 F. Supp. 364, 374 (E.D. Va. 1979). Marmott has clearly alleged a "trade" injury.

Despite this error regarding the relevant statute of limitations, the district court judgment must stand. Marmott has not pleaded concerted action subject to § 18.2-499. There is no claim that the Kolkers were acting outside the scope of their employment in making calls to Marmott's customers. The mere statement that the Kolkers were sued in their individual capacities is not such a claim. Cf. Nelson Radio, 200 F.2d at 914 (conspiracy

between corporation and its agents requires actions outside scope of employment); Griffith v. Electrolux Corp., 454 F. Supp. 29, 32 (E.D. Va. 1978) (same). The Marmott theory that § 18.2-499 (b) does not require a showing of concerted action is also without merit. That subsection concerns an attempt by one conspirator to bring a third party into the conspiracy. We assume, for summary judgment purposes, that the Kolkers did call Marmott's customers and did tell them not to buy from Marmott because Marmott was selling "stolen goods." Such a course of action is not an attempt to bring customers into a conspiracy; it is an effort to persuade customers not to do what they already have the right not to do. The customers that the Kolkers called

could have had not conspirational intent.

Marmott's claim under §18.2-499 was properly rejected in granting summary judgment to the Kolkers. The error of law concerning the statutory limitations period was harmleess, given the alternative grounds for the decision: Marmott failed to alleged the existence of a conspiracy to injure him in his business. Since he also failed, as a matter of law, to show that a contract existed to merge his company with Maryland Lumber, the summary judgment below is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 85-2344
85-3950

FILED
Jan 30 1987
U.S. Court of Appeals
Fourth Circuit

Stephen Marmott, et al. Appellants,

versus

Maryland Lumber Company,
etc. et al.

Appellees.

On Petition for Rehearing

O R D E R

Upon consideration of the appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Erwin, with the concurrence of Judge Chapman and Judge Wilkins.

For the Court,

John M. Greacen
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN MARMOTT, ET AL.,	:	
Plaintiffs	:	
v.	:	Civil Action No. R-83-4016
MARYLAND LUMBER CO., ET AL.	:	
Defendants.	:	

MEMORANDUM AND ORDER

On August 26, 1985, the United States Magistrate entered a Report recommending that defendants' motion for summary judgment be granted, and that the action be dismissed except for the equitable accounting currently pending. Plaintiffs have filed objections to the report and defendants have responded. Upon de nono consideration of the matter, the Court finds plaintiffs' objections to be without

merit and adopts the Magistrate's Report and Recommendation.

Many of the facts giving rise to and underlying the instant action are undisputed. Plaintiffs Marmott were engaged in the wholesale marketing of lumber and building supplies in Alexandria, Virginia, under the name of Irene Lumber until December 19, 1981. Defendant Maryland Lumber is engaged in the wholesale marketing of lumber and building supplies and operates from its headquarters in Baltimore. Defendant Milling, Drying and Treating (MDT) also was engaged in the wholesale marketing of lumber and building supplies. Defendants Fabian Kolker and James Kolker were principles of Maryland Lumber and MDT, respectively. James Kolker also was involved in the management of Maryland Lumber, but owned no stock and

was not a director of that corporation.

From May, 1981, until December, 1981, there was an agreement whereby Irene Lumber solicited sales for lumber and building products for MDT and prices proposed by MDT. MDT did all the bookkeeping and billing of customers under this arrangement. Upon receiving payment from its customers, MDT paid a commission to Irene Lumber. On December 19, 1981, a meeting was held between James Kolker, Stehen Marmott, and Marvin Ratick, Mr. Marmott's father-in-law and a co-owner of Irene Lumber. The purpose of the meeting was to terminate the MDT - Irene Lumber arrangement and to discuss new potential business relationships. The crux of the dispute in this action concerns the nature of the final relationship agreed upon

during that meeting, if such agreement was ever really reached.[1]

From December 21, 1981, until March 17, 1982, the Alexandria Lumber Yard, formerly operated as Irene Lumber, was operated as a branch of Maryland Lumber. Invoices were printed on forms with Maryland Lumber's name, inventory was transferred to the Alexandria facility from Maryland Lumber's yard in Baltimore, all proceeds from the sale of inventory went directly to Maryland Lumber, and Maryland Lumber employees were transferred to the Alexandria facility from the Baltimore office to assist with sales,

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1 No written document was ever prepared to memoralize the business relationship allegedly agreed upon between the parties at the meeting, however, Mr. Ratrick later prepared a document entitled "Minutes of Special Meeting."

deliveries and other functions. During this period, Stephen Marmott received a salary of $600.00 per week from Maryland Lumber, later converted to a $600.00 per week draw against commissions to be earned.

On March 13, 1982, Stephen Marmott presented the aforementioned "Minutes of Special Meeting" to James Kolker. The Minutes were purported to evidence an agreement between Plaintiff and defendants to merge Irene Lumber with Maryland Lumber, to establish remuneration for Stephen Marmott, and to give Stephen Marmott an option to purchase Maryland Lumber stock. (See Paper No. 64, Attachment A). On March 17, 1982, Maryland Lumber removed its documents from the Alexandria yard, and notified Mr. Marmott of its intention to terminate its business relationship

with plaintiffs. Maryland Lumber then filed a successful action for replevin in the Circuit Court for the City of Alexandria and took possession of the materials, stock, and equipment in the Alexandria facility.

Plaintiffs' amended complaint[2] sets forth four counts. First, plaintiffs contend, that, at the December 19, 1981 meeting, there was an oral agreement

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2 The Magistrate's Report and Recommendation refers to the amended complaint filed on March 13, 1984 (Paper No. 12). The pleadings filed by the parties in response the Magistrate's Report and Recommendation refers to a second amended complaint filed on march 12, 1985 (Paper No. 46). There is no indication in the Court's file that an order had been entered granting plaintiffs' motion for leave to file second amended complaint. However, the Court will address the aspects of the second amended complaint where both parties have referred to it in their pleadings.

between the parties to "merge" Irene Lumber and Maryland Lumber, and that defendants have wrongfully breached this merger agreement. Second, Stephen Marmott contends that he was given an option to purchase ten percent of the stock of Maryland Lumber, and that defendants' breach of the merger agreement has prevented him from exercising that option. Third, plaintiffs allege that, on several occasions following the termination of the business relationship, Maryland Lumber personnel, acting within the scope of their employment, telephoned former customers of the defendants and informed those customers not to purchase lumber from Irene Lumber because that lumber was stolen. Plaintiffs contend that these statements were false and defamatory per se. Finally, plaintiffs alleged that,

following the termination of the relationship, James Kolker, on behalf of Maryland Lumber, wrote to Irene Lumber's customers and suppliers, indicating to them that the Alexandria facility had been closed, and informing them to call Maryland Lumber in Baltimore for supplies. Plaintiffs assert that these actions constituted willful interference with advantageous relations between plaintiffs and their former customer.

Defendants have moved for summary judgment on all four counts. A grant of a motion for summary judgment is appropriate only when "there is not genuine dispute as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56; National Constructors Ass'n v. National Contractors

Ass'n, Inc., 498 F.Supp. 510, 520 (D. Md. 1980), modified on other grounds, 678 678 F.2d 942 (4th Cir. 1982). In addition, there should be "no disagreement as to the inferences which may be drawn from the undisputed facts" Steinberg v. Elkins, 470 F.Supp. 1024, 1030 (D. Md. 1979). The burden is on the moving party and any doubts as to the existence of a genuine issue of material fact will be resolved against the movant. See Adikes v. S.G. Kress & Co., 398 U.S. 144 (1970).

I. Wrongful Breach of Conduct

Plaintiff's argue in their opposition to the Matistrate's report and Recommendation that summary judgment is inappropriate in the instant case because it is the jury's chore to resolve the inconsistencies surrounding the disputed agreement between Irene and Maryland

Lumber. However, it is the fact that these inconsistencies exist which makes summary judgment appropriate. It is the rule in Maryland and elsewhere that neither courts nor juries shall make a contract for the parties. See Robinson v. Gardiner, 196 Md. 213, 217, 76 A.2d 354, 356 (1950). Plaintiff further asserts that taken alone, the "Minutes of Special Meeting" in conjunction with Stephen Marmott's affidavit indicate that a definite arrangement was agreed to. However, when ruling on a motion for summary judgment, the Court cannot so confine its view and must examine all of the evidence presented. See Fed.R.Civ.P. 56(c).

The first two counts of plaintiffs' amended complaint charge defendants with

wrongfully breaching the agreement which allegedly was agreed upon at the December 19, 1981 meeting. Although plaintiffs contend that there was an agreement, as evidenced by the "Minutes of Special Meeting" (Paper No. 64, Attachment A), defendants assert that no agreement was reached as to either a potential merger of the two companies or to a stock offering to Stephen Marmott. Maryland law[3] follows the universal rule that a manifestation of mutual assent is an essential prerequisite to the creation or formation of a contract. See, e.g., Eastover Stores, Inc. v. Minnix, 219 Md. 658, 665, 150 A.2d 884, 888 (1959). The mutual assent is created when there is a knowing and

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3 This Court follows the Magistrate's interpretation that Maryland law applies.

sufficient acceptance of a certain and definite agreement. See Maryland Supreme Corporation v. Blake Co., 279 Md. 531, 539, 369 A.2d 1017, 1025 (1977). If the agreement is so vague or indefinite that it is not possible to collect from it the full intention of the parties, it is void. See Strickler Engineering Corp. v. Seminar, Inc., 210 Md. 93, 101, 122 A.2d 563, 568 (1956); Robinson v. Gardiner, 196 Md. 213, 217, 76 A.2d 354, 356 (1950). By requiring the agreement to be sufficiently clear and definite, courts may know the purpose and intenton of the parties when called upon to enforce it. Robinson, 196 Md. at 217, 76 A.2d at 356. Courts will not make a contrct for the parties when the terms are too vague or indefinite. Id.

For the purposes of ruling on the pending motion, plaintiffs' allegations

are to be taken as true. See Jenkins v. McKeithen, 395 U.S. 411, 421-22 (12969). The inconsistencies found in plaintiffs' own assertions as to what arrangement resulted from the December 19, 1981 meeting indicate that an agreement was never reached.[4] Plaintiffs assert that

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[4] In plaintiffs' opposition to the Magistrate's Report and Recommendation, the plaintiff asserts that the inconsistent statements were made because Marmott, as a layman, did not know the difference between a joint venture and a merger. However, the diagram prepared by Marmott and his testimony at depositions clearly indicates that he knew there was a difference between mergers and joint ventures but that he did now know which arrangement was agreed upon in structuring the deal. The opposition further asserts that the "Minutes" made after the December meeting indicate that Marmott had a merger in mind. However, there is clear indication that a merger was not what defendants had in mind because defendants never accepted the Minutes as being true and because defendants ended their relationship with Irene Lumber within four days of first being presented with the Minutes. Since there was no meeting of

the "Minutes of Speical Meeting" clearly indicate that the arrangement was to be a merger of the Maryland and Irene Lumber Companies under a new name that was to be later determined. (See Paper No. 64 at 7). However, a diagram prepared by Stephen Marmott in March, 1982, indicates that he was unsure as to whether the business relationship between the parties was, or would be, that of a merged entity or a joint venture. (See Exhibit M. Attachment to Paper No. 47). In the course of a deposition, Mr. Marmott testified that he did not know whether the alleged deal was to be structured, as a merger or as a joint venture or as a joint venture fol-

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the minds on whether a merger was to take place, there is no binding agreement. See, Eastover Stores, 219 Md. 658, 150 A.2d 884 (mutual assent required to have a binding agreement).

lowed by a merger. (See Exhibit B at 95a, 113a, 115a, Attachment to Paper No. 47. these variances and inconsistencies clearly indicate that contrary to plaintiffs' assertion, a final arrangement between Irene Lumber and Maryland Lumber had not been agreed upon and this Court will not make an agreement where the parties have failed to do so.

Further inconsistencies are seen in the structuring of Stephen Marmott's alleged stock offering. Plaintiff Irene Marmott stated in her deposition that although Stephen Marmott would be getting stock in Maryland Lumber, the specific amounts of said offering were not determined at the December meeting and would not be determined until a later date. (See Exhibit H at 42, 44, Attachment to Paper No. 47). This statement indicates

that the parties had not reached a firm agreement on the amount of stock that Marmott would be entitled to. The "Minutes of the Special Meeting," so heavily relied upon by plaintiffs, state that Stephen Marmott was to be given an option to purchase Maryland Lumber stock "in an amount and at a price to be determined, not later than January 1, 1983." (See Attachment A to Paper No. 64). Plaintiffs' amended complaint, however, asserts that Stephen Marmott was given the option to purchase 10% of Maryland Lumber's stock (Paper No. 26, Amended Complaint, para. 7(b)(9) and in a deposition, Stephen Marmott stated that the option permitted him to receive no more than 10% of Maryland Lumber Company's stock. (See Exhibit B at 97, 103, 105, Attachment to

Paper No. 47). These various inconsistencies make it clear that the parties never agreed upon the essential terms of the alleged agreement. Without any meeting of the minds, there can be no enforceable contract and accordingly, the defendants must prevail on their motion for judgment on the first two counts.

Defendants have further asserted that the oral contract as a whole, and particularly, the alleged provision involving the option to purchase common stock in Maryland Lumber, is unenforceable as volative of the "one year" clause" of Maryland's Statute of Frauds.[5] The one

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5 Maryland law provides:

No action may be brought:

(3) Upon any agreement that is not to be performed within the space of

year clause" of the Statute of Frauds does not bar collection of damages for the breach of an oral contract absent an express and specific provision in the contract that it is not to be performed within one year or a clear demonstration by its terms that it is not or could not be so performed. General Federal Construction, Inc. v. Federline, Inc., 283 Md. 691, 393 A.2d 188 (1978). Indeed, it makes no difference how long the parties expect the performance to take or how

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> one year from the making thereof;
>
> Unless the contract or agreement upon which the action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged, or some other person lawfully authorized by him.

Md. Ann. Code Art. 39C, § 1 (1982 Repl. Vol.). Virginia law is to the same effect. See Va. Code Ann., §11-2(7) (1984).

reasonable and accurate those expectations are, if the agreed performance possible can be completed within one year. See, e.g., Chesapeake Financial Corp. v. Laird, 289 Md. 594, 425 A.2d 1348 (1981); Adams v. Wilson 264 Md. 1, 284 A.2d 434 (1971).

It is clear from the deposition testimony of Stephen Marmott that the alleged option to purchase Maryland Lumber stock could not have been performed within one year of the alleged December 19, 1981 agreement. On two occasions during a deposition, Stephen Marmott stated that the amount and price of the stock were to be based upon the profit shown at the Alexandria facility "and the end of the next year [1982],: (Exhibit B at 97, Attachment to Paper No. 47), and upon the net worth of Maryland Lumber at the end of calendar year 1982. (Id, at 104-05).

In the opposition to the Magistrate's Report and Recommendation, plaintiffs argue that there was a possibility that the stock option could be performed within one year of the oral agreement. Plaintiffs argue that the "agreement" set January 1, 1983, as the latest date to determine the amount of stock to be transferred but that Fabian Kolker could "guess at" the amount of stock prior to December 31, 1982. However, Stephen Marmott admitted that neither the amount of stock to be purchased nor the price at which it would be purchased could be ascertained prior to the end of the 1982 calendar year. (See Marmott Deposition, Exhibit B at 103-05, 227a-230a, 429B, 435B, Attachment to Paper No. 47). Thus the alleged December 19, 1981 agreement to give Stephen Marmott an

option to purchase Maryland Lumber stock could not have been performed within one year of the oral contract. Accordingly, enforcement of any such oral contract is barred by the Statute of Frauds.

Plaintiffs contend that the "contract" is removed from the ambit of the Statute of Frauds because one provision of the December 19, 1981 agreement called for the parties to put the oral agreement into writing within a year. Plaintiffs assert that the Magistrate erred in applying the rule stated in Backus Plywood Corp. v. Commercial Decal, Inc., 208 F.Supp. 687 (S.D. N.Y. 1962), where the Court held that "an oral agreement to execute agreements, where the latter are required by the Statute of Frauds and unenforcible . . ." Id. at 695. Plaintiffs urge that the better rule is

found in 3 Williston, Contracts § 524A.

In his treatise, Williston stated that:

> Whether a court will thus allow in effect the enforcement of the principal agreement though that is oral depends upon its attitude towards the Statute of Frauds. Technically, the agreement to reduce the main contract to writing is not within the Statute; and courts desirous of limniting the Statute to the narrowest possible field will be disposed to enforce the contract.

Id. at 691.

However, Professor Corbin stated in his treatise that "a contract that is unenforcible by reason of the Statute of Frauds cannot be made indirectly enforcible by promising to execute a sufficient memorandum or otherwise to satisfy the requirements of the Statute." Corbin on Contracts § 238. In Green v. Pennsylvania Steel Co., 75 Md. 109, 23 A. 139

(1891), the Maryland Court of Appeals held that it would be a "contradiction in terms" to allow plaintiffs to bring an action against defendants for failing to execute an agreement when the underlying agreement violated the infra anum clause of the Statute of Frauds. Id. at 111, 23 A. at 140. Following the reasoning in Green, this Court cannot allow plaintiffs to bring a cause of action against the defendants for failing to prepare the agreement in writing when the underlying agreement is itself unenforcible under the Statute of Frauds.

Plaintiffs further assert that by performing their obligations under the agreement, the alleged contract should be taken from the purview of the Statute of Frauds. However, even assuming arguendo that plaintiffs have performed under the

agreement,[6] such performance only evidences the existence of some agreement. There is along-standing requirement in Maryland that ,"[T]he part performance itself 'must furnish evidence of the identity of the contract; and it is not enough that it is evidence of some agreement, but it must relate to and be unequivocal evidence of the particular agreement . . .'" Beall v. Beall, 291 Md. 224, 434 A.2d 1015, 1019 (1981), quoting Semmes v. Worthington, 38 Md. 298, 326-27 (1873).

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6 In their response to plaintiffs' objections to the Magistrate's Report and Recommendation, defendants stated several instances where plaintiffs failed to perform under the alleged agreement. (See Paper No. 79, at 26-27). Accordingly, the Court is not convinced that the plaintiffs have fully performed their obligations in such a way as to remove the alleged contract from the Statute of Frauds.

Plaintiffs' performance is consistent with that of a merger arrangement, and with that of a joint venture between Maryland Lumber and Irene Lumber and with that of a purchase of Irene Lumber by Maryland Lumber. Plaintiff's performance thus does not provide unequivocal evidence of a particular agreement resulting from the December 19, 1981 meeting. Accordingly, plaintiffs' actions do not remove the alleged contract from compliance with the Statute of Frauds. Plaintiffs further claim that defendant should be estopped from raising the Statute of Frauds defense on the grounds that it was the defendants' failure to reduce the December agreement to writing that later allowed them to invoke the infra anum clause. However, in order to raise the issue of estoppel plaintiffs must show that they reasonably

relied on defendants' conduct in a manner that led them to change their position to their detriment. Rubenstien v. Jefferson National Life Insurance Co., 268 Md. 388, 393, 302 A.2d 49 (1973). Maryland courts also require that the party claiming the benefit of estoppel to act with good faith and reasonably under the circumstances. Savonnis v. Burke, 241 Md. 316, 320, 216 A.2d 521 (1966).

The law governing mergers in Maryland is found in Md. Corps. & Ass'ns Code Ann. § 3-101 et seq.. (1985 replacement volume). Under Maryland law, articles of merger are required to be filed and such articles must contain the information found in § 3-109 of the Code. See Id. Sections 3-107, 3-109. A merger will not be effective until these corporate

formalities are complied with. See Downing Development Corp. v. Brazelton, 253 Md. 390, 252 A.2d 849 (1969); Prince George's County Club, Inc. v. Edward R. Carr, Inc., 234 Md. 591, 202 A.2d 354 (1964). The record clearly indicates that the parties did not comply with the formalities required for mergers. Accordingly, any reliance by plaintiffs on an alleged promise made by defendants is as a matter of law unreasonable and therefore the plaintiffs' cannot estop defendants from raising the Statute of Frauds defense.

Finally, defendants assert that the Statute of Frauds provision governing the sale of securities, in this case the option to purchase Maryland Lumber stock, was not complied with. See Md. Comm. Law Code Ann. § 8-319 (1975). That statu-

tory provision requires a contract for the sale of securities be in writing and signed by the party against whom enforcement is sought. Clearly this was not complied with. moreover, Stephen Marmott's presentation of the December 19, 1981 "Minutes" to James Kolker in March of 1982 did not constitute a writing in confirmation of the sale within a reasonable time, so as to remove the transaction from the Statute of Frauds. Id. at § 8-319(c). In addition defendants' subsequent termination of the business relationship must be construed as a "written objection" to the contents of those "Minutes." See Id.

II. Defamation

Plaintiffs allege in their defamation count that Maryland LUmber personnel, acting within the scope of their employ-

ment, telephoned former customers of Maryland Lumber and informed those customers not to purchase lumber from Irene Lumber because the lumber sold by Irene Lumber was stolen. Stephen Marmott cited three incidents as the basis for this claim. He contended that two such statements were made in March of 1982. (See Exhibit B at 204a-205a, Attachment to Paper No. 47). The other statement allegedly was made at a later date by Maryland Lumber employee Steve Koves and directed to George E. Frisco, President of G.E. Frisco Company.

Under both Maryland and Virginia law, the statute of limitations to be applied in defamation actions is one year. Md. Cts. & Jud. Proc. Code Ann. § 5-105 (1984 Repl. Vol.); Va. Code Ann., § 8-01-248 ;(1984). Accordingly, a defama-

tion action brought for the alleged statements made in March of 1982 is time barred. The sole remaining basis for plaintiff's claim is the alleged statement made by Steve Koves to George Frisco.

Defendants have proffered an affidavit from George E. Frisco, which states, in pertinent part:

> Neither Mr. Koves or any other agent, servant or employee of Maryland Lumber Company, or anyone else, ever told me that Stephen Marmott, Irene Marmott or Irene Lumber & Supply, Inc. was selling stolen material. Neither Mr. Koves nor anyone else of Maryland Lumber Company have ever discussed anyone by the name of Marmott with me at any time to my recollection.

(Exhibit Y, Attachment to Paper No. 47). Plaintiffs have not sought rebut this assertion. Accordingly, there is not genuine issue of material fact for trial in plaintiffs' defamation count and defen-

dants are entitled to judgment as a matter of law.

III. Interference with Advantageous Relations

In this Report and Recommendation, the Magistrate recommended dismissal of plaintiffs' count charging interference with advantageous relations. The Magistrate dismissed count III on the grounds that the interference with advantageous relations charge was "merely a recharacterization of the facts underlying [plaintiffs] defamation count." (Paper No. 74 at 15). In their objection, plaintiffs argue that the Magistrate erred because he ignored the Virginia statute for conspiracy to injure trade[7] and because he ignored the meaningful

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7 Va. Code Ann. § 18.2-497 (1980).

differences in gravamen and proof between plaintiffs' defamation count and interference with trade count.

Plaintiffs' interference with trade count is based on both a common law cause (Paper No. 46, para 22(a)) and a statutory cause (Paper No. 46, para. 22(b) and (c)). The substance of plaintiffs' claim is that defendants contacted customers and suppliers of Irene Lumber and gave them the impression that Irene Lumber had gone out of business and was trading in stolen materials. (Paper No. 64 at 32-33). Despite plaintiffs' assertion that the defamation count and the interference with business count are materially different as far as standards of proof and damages, the Court is convinced that the interference count is based on the same wrongs alleged in the defamation count. It is the wrong

alleged and not for form of action that counts in the measurement and application of the appropriate statute of limitations. Sides v. Richard Machine Wirksl, 406 F.2d 445 (4th Cir. 1969). Any other role would allow a plaintiff to evade the strictures of limitations statutes by cleverly characterizing the claims. See Korry v. International Telephone & Telegraph Corp., 444 F.Supp. 193, 195 (S.D. N.Y. 1978). The statute of limitations for defamation is one year. Accordingly, the alleged defamatory statements made to Messrs. Duggal and Jackson are time-barred. Plaintiffs have offered no other specific facts in support of the common law interference with relations count.

Plaintiffs have also brought their interference with relations count under

Virginia Code § 18.2-499 (1980). This allegation is based on same alleged defamatory statements as the common law count. A common law claim for libel and slander will not lie under Section 18.2-499. See Moore v. Allied Chemical Corp., 480 F. Supp. 364, 374 (E.D. Va. 1979). Accordingly, the statutory interference with trade claim should likewise be time-barred. See , Korry 444 F.Supp. at 195.

Further, plaintiffs have failed to state a claim under Section 18.2-499. To recover in an action for conspiracy to harm business under Section 18.2-499, plaintifs must prove (1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business and (2) resulting damage to plaintiff. Allen Realty Corp. v. Holbert, ___ Va. ___, 318 S.E.2d 592

(1984). In their proposed amended complaint, plaintiffs attempt to fulfill these requirements by alleging that "the individual defendants (James Kolker and Fabian Kolker) and defendant Maryland Lumber combined, agreed and mutually undertook, acting in concert with each other to willfully and maliciously injury both plaintiffs Marmott and Irene Lumber . . . ." (Paper No. 46, para. 22(b) and (c)). It is, however a legal impossibility to have a conspiracy between a corporation and its agents because a corporation can only act through its agents. See Griffith v. Electrolux Corp., 454 F.Supp. 29, 32 (E.D. Va. 1978). There is no indication that either James or Fabian Kolker were acting in any capacity other than as agents or officers of Mary-

land Lumber and thus plaintiffs' have failed to allege the requisite conspiracy. Accordingly, summary judgment in favor of defendants should be granted.

For the reasons stated herein, it is this 4th day of November, 1985, by the United States District Court for the District of Maryland,

ORDERED,

1. That magistrate's Report and Recommendation is ACCEPTED by the Court, and upon de novo consideration is ADOPTED bay the Court in all respects;

2. That the defendants' motion for summary judgment; is GRANTED; and,

3. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

Norman P. Ramsey
United States District Judge

MINUTES OF SPECIAL MEETING

A meeting was held at Irene Lumber & Supply Co., Inc. , 217 South Henry Street, Alexandria, VA. 22314, on Saturday, December 19, 1981 at 11 o'clock AM between Mr. Fabian Kolker and Mr. James Kolker of Maryland Lumber Co., Inc., Baltimore, Md. and Mr. Stephen Marmott and Mr. Martin Ratick of Irene Lumber & Supply Company, iNc. All attendees visited the sites of other lumber suppliers and after looking at sites over Mr. Fabian Kolder told Mr. Marmott to look into obtaining a property like the one Wyerhouser Corp. vacated so that the yard on Henry St., Alexandria, Va. could expand as space requirements dictated.

Following the site visits and after detailed discussion, it was agreed upon a

handshake between all the parties attending that the following are to be the true acts and business agreements between the two aforementioned lumber companies:

First: Irene Lumber & Supply Co., Inc. is to be merged with and become an integral part of Maryland Lumber Co., Inc. under a new name that shall be determined at a future time. The merger is to become effective on December 21, 1981 and the facility at 217 South Henry Street, Alexandria, Va. shall become a division of Maryland Lumber Co., Inc., Baltimore, Md.

Second: All the payroll and the bills and expenses currently owed by Irene Lumber & Supply Co. to its officers, salesmen, suppliers, and other creditors shall be assumed and paid by Maryland Lumber Co., Baltimore, Md. as they become due and payable.

Third: Maryland Lumber Co. will provide inventory in the amount and mix requested by Mr. Marmott or his appointed representative as soon as practicable to 217 South Henry Street, Alexandria, Va. Said inventory shall be carried on the account books at cost.

Fourth: A separate fiscal accounting system shall be established for the Alexandria division of Maryland Lumber Co., Inc.

Fifth: Checks for distribution out of the Alexandria Division of Maryland Lumber Co., Inc. shall bear the signature of Stephen L. Marmott and James D. Kolker.

Sixth: Expenses for the conduct of business at the Alexandria division of Maryland Lumber Co, Inc. shall be borne by Maryland Lumber Co., Inc., Baltimore, Md. until proceeds of the Alexandria division have reached a level adequate to meet its own expenses.

Seventh: Maryland Lumber Co., Inc., Baltimore, Md. shall initially provide trucks and a forklift to its Alexandria division.

Eighth: Net profit alfter expenses and taxes of the Alexandria division shall be divided equally, 50% to Stephen L. Marmott and 50% to James D. Kolker or such other party as he may designate.

Ninth: Stephen L. Marmott shall be given options to purchase stock in Maryland Lumber Co., Inc., in an amount and at a price to be determined not later than January 1, 1983.

WE, THE UNDERSIGNED, do file and record these minutes of a special meeting, and do certify that the facts herein are true; and we have accordingly heretunto set our hand.

s/_____
Stephen L. Marmott Dated

s/_____
Martin Ratick Dated

THE MARYLAND LUMBER COMPANY

MEMORANDUM

TO: Steve Marmott

FROM: James D. Kolker

DATE: March 17, 1982

RE: Alexandria Branch of
The Maryland Lumber Company

This will confirm our meeting today at The Maryland Lumber Company - 2600 West Franklin Street, Batimore, Maryland, wherein I advised you that we are shutting down operations at 217 South Henry Street, Alexandria, Virginia. This is effective immediately.

Please terminate all business operations in our behalf. We will make arrangements to retrieve all materials and records immediately. Your cooperation in this matter is greatly appreciated.

JDK/esk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN MARMOTT, et al.,)
)
Plaintiffs,)
)
v.) C.A. No.
) R-83-4016
MARYLAND LUMBER COMPANY)
et al.,)
)
Defendants.)
)

AFFIDAVIT OF STEPHEN MARMOTT

My name is Stephen Marmott. During all periods described in this affidavit I was President of Irene Lumber &SUpply, Inc. ("Irene")1/ This affidavit deals with matters raised by Defendants in their Motion for Summary Judgment.

1/ When referring to my wife I shall use her full name "Irene Marmott".

1. On May 7, 1981 I met with James and Fabian Kolker at the International Inn at Baltimore-Washington International Airport to discuss a new arrangement between Irene and Maryland Lumber Company ("Maryland Lumber"). Following that meeting I sent to the Kolkers a letter outlining the terms of the Agreement reached between us on May 7th. that Agreement was identified as "Marmott Deposition Exhibit 3"2/ during my deposition in this case. From May 7, 1981 until December 19, 1981 Irene and MDT engaged in a joint effort of selling. A subsidiary or affiliate of Maryland Lumber, Milling, Drying and Treating, Inc.

2/ If the text to any deposition exhibit is referred to, it will be attached to this affidavit; If not, the exhibit will simply be identifed.

("NDT") was chosen by Maryland Lumber to work jointly with Irene in this Agreement. There were a variety of transactions covered by this agreement depending on where delivery was made from and which company actually purchased the materials. Compensation was due to Irene in these transactions on the basis of a "spread", which was made up (in the great bulk of the transactions covered by the Agreement) of the difference between what Irene charged its customers for materials sold by Irene to them, less what MDT charged Irene for these same materials. Under this arrangement MDT did all of the invoicing of customers, all funds arising from sales made by Irene were transmiteted to MDT, all applicable sales taxes in Maryland, Virginia and the District of Columbia were to be paid by MDT, and MDT

was to compute the sums due Irene under the "spread". Although I received periodic payments from MDT during this period, I was owed in excess of $20,000 under this arrangement by MDT for the period ending December 19, 1981. This sum remains due and owning to me to this date. There is also a question of whether the sales taxes incurred during this period were actually paid by MDT. This matter is before Magistrate Goetz for an accounting.

2. In December of 1981 discussions commenced between me and James and Fbian Kolker looking toward a different arrangement between Maryland Lumber Company and Irene. MDT, as I understood it, was a subsidiary of affiliate of Maryland Lumber (with the Kolkers operating both); and this new arrangement

was to take the place of the arrangement described in paragraph 1. A series of conversations between me and Jim Kolker on this matter took place before December 19, 1981; on that date Fabian and Jim Kolker (father and son) came to Irene's yard at 217 South Henry Street in Alexandria, Virginia, to finalize the new arrangement between Maryland Lumber and Irene.

3. On December 19, 1981, I and my wife owned a majority of the stock in Irene, with the balance owned by my mother-in-law and father-in-law, Mr. and Mrs. Martin Ratick. On December 19, 1981 Irene held the following assets which were to be turned over to Maryland Lumber in the new arrangement discussed by Jim Kolker and me:

- The accounts receivable due Irene from MDT amounting to approximately $35,000; a small

amount of other accounts receivable and contracts in being in excess of $150,000 as to which no billing had yet gone out;

- The good will of Irene, whose sales had increased to an approximate volume of $35,000 to $150,000 per month as of December 19, 1981;

- A moderate line of credit from supliers available to Irene as of December 19, 1981;

- The yard at 217 South Henry Street, Alexandria, which was in the name of Irene, and leasehold improvements made by Irene;

- Equipment, a truck and fork lift and other miscellaneous yard and office equipment used at the South Henry Street Yard;

- My proved salesmanship ability in lumber and building materials in the Metropolitan washington are accumulated by me in periods before Irene came into existence, and enhanced by my sales activities with Irene;

4. The meeting between me, Martin Ratick, James Kolker and Fabian Kolker took place on December 19, 1981 at the

Irene office in the yard at 217 South Henry Street, Alexandria. Mr. Ratick took notes during that meeting. From those notes a document entitled "Minutes of Special Meeting" was typed by Mrs. Ratick on the same day. A copy of that document was marked as Marmott Deposition Exhibit 5 in my deposition in this case. 3/ That document accurately reflects what took place at the meeting between the Kolkers, Mr. Ratick and me on December 19, 1981. It was signed by me and Mr. Ratick on that day or the next day, December 20th.

4a. It was agreed at the meeting of December 19th that the profits to be earned by me in the sales and service area (which all of us marked out in a map in

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3 It is attached as attachment A to this affidavit and incorporated within it.

our office on December 19th, as described in paragraph 8 of this affidavit) were to be used by me if I desired to exercise the options to purchase Maryland Lumber stock; those options were agreed to on December 19th and are found in Paragraph Ninth of the "Minutes of Special Meeting". The amount and price of the stock covered by the options, as we (Fabien and James Kolker and I) agreed on December 19th was to be fixed during the beginning of the merger by measuring my 50% share of the profits earned by me in my sales and service area (as described in paragraph Eighth of the "Minutes") against the net work of the Maryland Lumber measured no later than January 1, 1983, with ceiling of 10% of Maryland Lumber's stock being covered by my options during this period. My profits were to be returned to Maryland

Lumber as the price for his stock. This seemed especially acceptable to Fabian Kolker who stated that this arrangement would return profits earned by the merged entity back into the company.

5. At the meeting on December 19, 1981, Fabian and Jim Kolker made commitments on behalf of Maryland Lumber. I had had business connections with Maryland Lumber since July of 1979 and throughout that time Fabian Kolker held himself out as President of the Company and major executive officer. In all of the arrangements in 1981 between me and MDT and Maryland Lumber, Fabian Kolker and Jim Kolker acted for those two companies, Fabian Kolker as president and James Kolker as a senior official of the Company. On December 19, 1981, the only other stock-

holder in Maryland LUmber of whom I was aware was Bud Kolker, who was gravely ill on December 19, 1981, and died within one week. At the meeting of December 19, 1981 I was informed by Jim and Fabian Kolker that Jim Kolker had received Bud Kolker's stock (and had become Vice President of Maryland Lumber) because of the disability (and, within one week, death) of Bud Kolker. On December 19, 1981, at the meeting I have described, the Kolkers acted as if they were authorized representatives of Maryland Lumber, as Fabian Kolker had for years in dealing with me, and as Jim Kolker had for the months preceding December 19, 1981. I dealt with them as such. This statement by Both Fabian and Jim Kolker of acquisition by Jim Kolker of Bud Kolker's stock, confirms by Fabian Kolker, assured me that I was

dealing with authorized representatives and majority stockholders of Maryland Lumber.

6. Near the close of the meeting of December 19, 1981, Fabian Kolker, whom I knew to be a lawyer, said to all of us that he ws a lawyer and would put in writing the agreements that we had reached during the meeting. I consented to this because it seemed a sensible way to put the agreement in writing. It was clear to us that this would be done immediately (within a few weeks) because the provisions that had been agreed upon on December 19, 1981 went into operation immediately on the next working day, (December 21, 1981). Indeed, on December 19, 1981, after the meeting, I turned over to the Kolkers a check drawn to Irene for

an order that was delivered just prior to the meeting. This was an indication that the agreement just reached was immediately operative.

7. Since the agreement of December 19, 1981, was for Irene a family affair, all of the stockholders (my wife and I, and my father and mother-in-law) sat together and approved the Agreement the next day, December 20, 1981. We felt that the Agreement that had been reached was a family affair on both sides, between our family and the Kolker family. As such, it was not considered by me and my in-laws a complicated merger of big business with all kinds of formalities, but more of a family agreement on both sides. And we all trusted the Kolkers at that time.

8. It was my understanding and that of the Kolkers that the new arrangement

was to become effective immediately, an the Minutes so stated in the First Paragraph. Monday, December 21, 1981, was the first business day after the December 19, 1981, meeting. As of that date both parties commenced performing under the Agreement reached on December 19, 1981:

- As of December 21, I (and the Yard at 217 South Henry Street) ceased doing business as Irene, and commenced doing business as "Maryland Lumber Company of Virginia", the name that had been agreed upon for immediate use during the December 19th agreement.

- The telephone at the office in 217 South Henry Street was answered with the response "Maryland Lumber Company of Virginia." This was the response agreed to at the December 19th meeting.

- All of the personnel at the yard were put on Maryland Lumber's payroll;

- A truck and fork lift was sent from the Baltimore yard of

Maryland Lumber to the 217 South Henry Street Yard for use there;

- All invoicing of sales was done on Maryland Lumber invoices sent down to use and not on Irene invoices;

- Commencing during the two week period after December 21, inventory (described in paragraph three of the Minutes) was sent down from the Bltimore yard of Maryland Lumber for sale at the Alexandria Yard and mixed with the existing inventory;

- Commencing as of that date, December 21, 1981, all of the expenses of the yard (rental, payroll and other operating expenses) were paid by Maryland Lumber;

- Within a short period after December 19th, two employees of Maryland Lumber, Norman Jorkscheit and Mike Ogrzalek were sent from the Baltimore yard of Maryland Lumber (where they had worked) and began working regularly at the Alexandria yard;

- I commenced receiving the amount of $600.00 per week from Maryland Lumber as a draw against the 50% split of profit due me under the December 19th

> Agreement; The profits were to be measured by sales generated by me in an area (designated by the Kolkers and me on a map in our office on December, 19th covering Northern Virginia, Maryland south of Rockville and the District of Columbia;)

Thus, both companies involved in the agreement made on December 19, 1981 began performance of that Agreement without waiting for any document to be signed. This was important for me, because as of December 21, I ceased doing business as Irene and did business solely for Maryland Lumber. All of the provisions of the December 19, 1981, agreement were put into effect immediately, by both maryland Lumber and Irene, except only the provisions dealing with separate bookkeeping, stock in Maryland Lumber Company, and the putting of the Agreement into writing by Fabian Kolker. As far as I and Irene were

concerned, as of December 21st we were performing all of our obligations under the December 19th agreement.

9. The contention is made by the Kolkers in this case that the agreement between them and me is vague and uncertain. That agreement is set forth in the "Minutes of Special Meeting", marked as Marmott Deposition Exhibit #5, and attached as attachment A to this affidavit and incorporated within it. From a businessman's viewpoint, that agreement is clear, unambiguous and contains all of the provisions that were required to go into action immediately (on December 21st) as a merged entity. And that is precisely what I, Irene, and Maryland Lumber did. There may have been legal details that had to be added, but I was unaware of the details on December 19, 1981, and left

them in the hands of Fabian Kolker, a lawyer, who had agreed (at the meeting on that date) to write up the Agreement in accord with what had been agreed upon.

10. As time went by after December 19, 1981 I asked Jim Kolker on a number of occasions for the written document reflecting the Agreement of December 19, 1981. I did so during the first six weeks after December 19, 1981. On these occasions I ws told by Jim Kolker that Fabian would produce it shortly. Fabian Kolker, howevr, did not produce that document or if he did, I have never seen it. Late in February or in early March of 1982, the question of transferring the telephone number for the Alexandria Yard from Irene to Maryland Lumber Company of Virginia (the style under which we had

been doing business since December 21, 1981) came up between me and Jim Kolker. I was advised by an employee of the telephone company that there should be a written agreement before Irene's name was taken out of the telephone directory. I told this to Jim Kolker and he said)on this occasion early in March) that since Fabian Kolker had not produced the document reflecting the December 19th Agreement I should ask another lawyer to do so. On or about the 10th of March, I consulted Matt Clary, III, Esq. a lawyer in Fairfax, and asked him, first, to consult with the Kolkers and, second, to prepare the document that reflected that December 19, 1982 Agreement. I gave Mr. Clary the "Minutes" (Marmott Deposition

Exhibit 5) 4/ so that he would know what the parties had agreed to. I further instructed Mr. Clary to communicate with the Kolkers before producing the written Agreement. Because the Kolkers broke the merger arrangement on March 17, 1982, Mr. clary never had a chance to produce the document.

11. In the second week of March, 1981, a question of the authority to hire and (in this case) fire a driver at the Alexandria Yard, Tom Stives, came up between me and Jim Kolker. At that point, the operation of the Alexandria Yard had been carried out under the terms of the agreement of December 19, 1981, by me and by Irene to close to 2-1/2 months. I met

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5 Attached and incorporated within this affidavit as attachment A.

Jim Kolker at a McDonald's Restaurant near the Maryland Lumber Company yard on or about March 13, 1981. Because it was relevant to our discussions on the Stives issue, I gave Jim Kooker a copy of the signed "Minutes" (Marmott Deposition Exhibit 5). 5/ From that day to this, I have never received a written response to that document. Only through the conduct of Maryland Lumber on March, 17, 1982, did I learn of the Kolkers' disagreement with the terms of that document.

12. Although it may be irrelevant to the issue now before the Court, I was called to Maryland Lumber in Baltimore on March 17, 1982, on the pretext that we had to discuss transportation of inventory and

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5 Attached to this affidavit incorporated within it as Attachment A.

equipment from 217 South Henry Street to a larger yard. In Baltimore I also turned over to Jim Kolker a contract from Associated Builders for approximately $200,000.00. Wholly unexpectedly, Jim Kolker informed tht business operations under the Agreement of December 19, 1982 were terminated, and gave me a document so stating. 5A/ While I was in Baltimore, the employees of Maryland Lumber at the Alexandria Yard went into the files kept there, and against the protest of other employees at the Yard, took all of the documents in my files, those reflecting transactions since December 10, 1981 as well as those reflecting earlier transactions.

5A/ Identified during James Kolker's deposition as James Kolker Deposition Exhibit 15, attached to this affidavit as Attachment B.

I was left only a handful of records dating back to June and July, 1981. Because there was a cloud over the inventory at the Yard at that time (whether it was Irene's from the period prior to December 19, 1981 or the merged entity's for the period thereafter), I was left--on March 17, 1982--with no inventory to sell, and no business and a total of $49.00 in cash. The lumber in the Yard that day wa kept intact and never sold by me.

13. On the next day, Jim Kolker telephoned me. I took the call in the Yard office in Alexandria. While in that office I taped that telephone call. The tape has been identified by me and tendered to Jim Kolker and his attorney and portions from that tape, hereby identified by me in this affidavit, are

referred to in other papers presented to the Court I state to the Court that the quoted portions in paragraph 14 below) are from the tape.

14. Jim Kolker told me the following in our conversation (described in paragraph 13) on March 18, 1982:

> (James Kolker's words) "I thought that the reason we merged was so that you join forces...you told me that you said I would like to join forces, so I don't have to be the only one, bearing this and I would go away and rest easy and I would like to join your company. See, that was my understanding."

I further state that in the same conversation James Kolker repeatedly indicated that I could stay on as an employee, as the salesman, for Maryland Lumber. For reasons succinctly told Mr. Kolker by me in this conversation I refused.

15. In the period following March

17, 1982 various employees of Maryland Lumber contacted customers that I had dealt with for Irene (before December 19, 1981) and for Maryland Lumber (after December 19, 1981). In a number of such telephone conversations these customers were warned by employees of Maryland Lumber, including Jim Kolker, that they should not purchase any lumber or building supplies from me (or from Irene, which I attempted to reestablish at the Yard after March 17, 1982) because these materials were "stolen materials" or "stolen lumber". These customers were given the impression that the Alexandria Yard had dismantled and had gone out of business. Affidavits from officials of two such customers (Paul Duggal and David Jackson) are filed within the Court together with this affidavit.

16. In May of 1982 there was a meeting at a home in Maryland attended by me, my wife, Mr. Ratick, James and Fabian Kolker, Donald Parks (Maryland Lumber's comptroller) and a friend of one and of the Kolker's. This home, as I recall, was the home in which Fabian Kolker was then living. At the meeting we discussed the termination of the agreement of December 19th. I told the Kolkers of the unfairness of what they had done to me, and the hardship that they had caused me. The Kolkers indicated that the terms of the December 19, 1981 Agreement as reflected in the "Minutes" (Marmott Deposition Exhibit 5) 6/ were rejected by them. They then offered to employ me as a salesman of their company. Under the

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6/ Attachment A to this affidavit.

circumstances I rejected this proposal.

These appear to be the salient portion of the facts of this case relevant to the motion before the Court.

I verify under penalty of perjury that the foregoing affidavit is true and correct. executed on July 12, 1985.

_____

Stephen Marmott

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN MARMOTT, ET AL.,	:	
Plaintiffs	:	
v.	:	Civil Action No. R-83-4016
MARYLAND LUMBER CO., ET AL.	:	
Defendants.	:	

AFFIDAVIT OF MARTIN RATICK

My name is Martin Ratick. I am the father-in-law of Stephen Marmott, a plaintiff in this case. I am the father of Irene Marmott, Stephen Marmott's wife.

I am a graduate of a school of engineering and a Registered Professional Engineer. I worked in various positions for 15 years for General Electric and then worked as an engineer with the Department of the Army and the Department of the Navy

for over 20 years. I refer to these facts because they explain the background in which I gave my testimony at deposition in this case.

I have re-read the transcript of the deposition taken of me in this case. I give this affidavit to correct certain wholly inaccurate implications drawn from that deposition by the Defendants in their motion for Summary Judgment.

I was Vice President of Irene Lumber Supply, Inc., on December 19, 1981, the date on which certain events took place described by me in my deposition.

First, I wish to reaffirm the accuracy of the "Minutes of Special Meeting" which was identified as Ratick Deposition Exhibit 4 1/ during my

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1/ Attached to this affidavit as attachment 1.

deposition. Those "Minutes" were taken from notes that I took during the meeting on December 19, 1981 (between me, Stephen Marmott, James and Fabian Kolker) accurately and fully. My wife typed up those "Minutes" from my notes on the same day that the meeting took place. I took my notes of what transpired in it. My wife routinely types finished copies from my hand written notes.

Second, I wish to correct the implication made by the Defendants concerning my testimony recorded at page 91 of my deposition transcript. In response to a question from counsel for the Defendants I first stated that:

> "Steve Marmott was givinng up Irene Lumber, Inc., which would be folded into Maryland Lumber"

I then testified:

> "That Steve Marmott should get a

> percentage of the stock in Maryland Lumber"

Counsel for defendants then asked:

> "How did the Kolkers respond to that suggestion"

And I answered:

> "Well, their response was, yes, we will see".

That <u>was</u> their response at <u>that</u> juncture of the meeting on December 19th. Later in the meeting the subject of stock in Maryland Lumber Company came up again. After the Kolker's first response (described by me above), Fabian Kolker then, at a later point in the same meeting, went into the subject again. It was <u>then</u> that Fabian Kolker agreed with Steve Marmott (as stated in paragraph Ninth of the Minutes of the meeting of December 19th typed by my wife from notes taken during the meeting) that Steve

Marmott:

> "Shall be given option to purchase stock in Maryland Lumber Company, in an amount and at a price to be determined not later than january 1, 1983."

That agreement, made by Fabian Kolker with Steve marmott in the meeting on December 19th, is accurately reported in the "Minutes" (identified as exhibit 4 during the deposito, and attached to this affidavit).

Third, if the transcript of my deposition is read carefully, at page 99 I testified regarding the same exhibit, (Ratick Deposition Exhibit 4). After answer the following question concerning Minutes, I was asked by counsel for the Defendant:

> "Q.: Those are from the notes that you made while you were sitting at the South Henry Street Address?"

and I answered:

"A: That's correct.

After giving this testimony, I was asked by Counsel for the Defendants:

> "Q. Do you recall any further discussions about, other than what we have discussed already, about stock for Stephen Marmott."

My answer dealt with what we had just discussed; the notes I had taken and the Minutes typed from them. I answered the above question:

"A: No."

That answer was consistent with what I had just testified to: the Minutes that "we had just discussed" contained the full discussion that took place between the individuals at the meeting on December 19th.

Fourth, at Page 108 of the transcript of my deposition, I was asked:

> "Q. When you say he (Mr. Marmott) is to be a principal of the business (Maryland Lumber) it is apparent from what you said that there was no decision, no agreement yet at that point as to stock ownership; is that correct?"

My answer came directly from my past experience in private industry and in the government:

> "A. There was discussion, but no agreement."

By "agreement" I meant no written document was in existence on that day, signed by the parties. That was and is my understanding of what a legal agreement requires, a written document and signatures. This was my experience in private industry and in the government. As a layman, I had no idea (nor do I have now) what is, or what is not required for a legal "agreement."

I wish to make clear, however, that

everything that is included in the "Minutes" that were identified as an exhibit in my deposition, (Ratick Deposition Exhibit 4) took place as I recorded it, and that each item set forth in that exhibit was agreed to by James and Fabian Kolker and Stephen Marmott in that room on December 19, 1981.

Fifth, the implication is made that my testimony (at page 109, of the transcript) was that there was no agreement reched at the meeting on December 19, 1981 concerning the amount of stock in maryland Lumber Company that Steve Marmott was entitled to purchase. That is not true.

It was agreed that Marmott was entitled (under the agreement reached on December 19) to 50% of the profits

generated from a sales and service area that Marmott ws given, which we all agreed on, using a map that was on the wall in an adjoining room (the bookkeeping office) from the one we were meeting in. Those profits calculated at the close of business in 1982 were to be used by Marmott to purchase up to 10% of the stock in maryland Lumber Company, at whatever value that stock had when this calculaton was to be made.

Finally just before all four of us at the meeting shook hands on the agreement and then left, Fabian Kolker said to the four of us that he was a lawyer and that he would put the agreement that we reached on that day (December 19, 1981) into writing for Steve Marmott and the Kolkers to sign.

Further, an implication is made that

my answer to the following question on page 109 of the transcript:

> "Q. There was o agreement as to how or when or how much stock or what consideration; is that correct?"

to which I answered:

> "A. There was discussion about it."

followed by:

> "Q: And the result, the end of the discussion was, "we will see" from Fabian Kolker."

following which I answered:

> "A: That's correct5."

implies that there was no agreement reached on that day that Marmott was given the right to purchase Maryland Lumber Company stock. That is wholly untrue. The "We will see", to which I referred, referred to the profits for 1982 from the sales and service in the area given Marmott by agreement with the Kolkers in

the December 19th meeting. It was those profits that his phrase "We will see" referred to, and it had to in the understanding reached between all of the parties on December 19, 1981.

I verify under penalty of perjury that the foregong affidavit is true and correct. Exected this 3rd day of July, 1985.

_____

Martin Ratick

A. Yes. I recall about the amount of stock. I knew we were getting the stock because that is the reason that we agreed to merge.

Q. So what did "We will see" mean to your understanding?

A. How much stock there would be.

Q. What did "We will see" mean?

A. How the profits would be.

Q. You previously indicated that you understood that this agreement was to be reduced to writing?

A. The agreement would be made up by Fabian Kolker and he would form all the necessary legal things to be done because he said it is the bookkeeping system involved and he wasn't sure if we were to operate as a division or under a separate name. We left that

to him. He was an attorney.

Q. If there was to be a separate corporation formed, is that right?

A. That was up to Fabian.

Q. So it could have been a new corporation formed to do this or Maryland Lumber could have done it itself, is that right?

A. That was up to Fabian.

Q. If a new corporation was formed who was to own the stock of the new corporation?

A. It would be up to Fabian to handle that end of the transaction. We had made our basic agreement. He said he was going to handle the legal things with it, to do it right. He said he was an attorney and, "I will do it." It is complicated, he said.

Q. So your agreement was that Irene

would be subsumed within Maryland Lumber, is that right, or that a new corporation would be formed to do what Irene Lumber had been doing?

A. From my understanding we were getting the stock in the Maryland company in Baltimore. We knew that we were sharing 50 percent of the profits from that area that we spoke about. The mechanics Mr. Kolker, Fabian, told us he would handle. We in good faith felt that he was representing whatever power to be as an attorney to handle that aspect.

We shook hands on it. We had done business prior. We had been doing business with Jim for six or eight months and we believed, I saw we, myself, Mr. Ratick, that that is the

way it was and we operated for three months until we got a call to come up to Baltimore on those premises.

Q. Was there any agreement about what office if any you would hold in Maryland Lumber?

a week or so.

BY MR. COOPER:

Q. Do you know what month it was in?

A. It must have been the late part of April or March. He returned a week and a half, two weeks before.

Q. What did you do when the merger papers were not forthcoming from Fabian?

A. Requested them on a few occasions, from Jim and from Fabian.

Q. What happened?

A. We were still waiting for them. I am not being facetious.

Q. Did you do anything about it?

A. Yes. We did.

Q. What did you do?

A. We were instructed by Mr. Jim Kolker and by Normal Jurkscheit to please have our phone turned over to

Maryland Lumber. At that point I requested again I would like the papers that were supposed to be coming and they said to me, "Well, look, Fabian can't do it now. And why don't you go to a local attorney and get the papers drawn up for us and we will sign them."

Q. Who told you that?

A. It wa told by Jim Kolker and by Norman.

Q. Norman Jurkscheit?

A. That's right.

Q. So you had a specific conversation with Norman Jurkscheit about this?

A. That's right.

Q. When was that?

A. Just preceding when I went to the attorney for that reason.

Q. Tell me what Mr. Jurkscheit told you?

A. He said, "Jim, why don't you go to the attorney and get the papers so we can sign this over and sign over the phone?"

I said the phone was not in my name and I would have to have the papers.

Q. You told this to Mr. Jurkscheit?

A. I told it to Mr. James Kolker and Mr. Jurkscheit.

Q. Let's back up again. I want to make sure I understand. Did Mr. Jurkscheit only speak to you, that is, discuss with you the phone as an issue raised by him?

A. No. He spoke to William Barron about it. He spoke to myself about it. He spoke to John about it. It was common knowledge in the office. When

he asked me to do it I said I gladly would.

Q. Did he talk to you about the purported merger?

A. We spoke about the merger, he knew we had merged, he knew what was the position down there, what we were doing with the shipping, the fact we were looking for the other property and he was supposed to be looking for what other property for us.

Q. Did he instruct you to go to some lawyer to have the, quote , "merger paper", unquote --

A. Jim asked me to do it and Norman was the reminding force.

Q. Norman reminded you to go to the lawyer to have the merger paper drafted?

A. That's right.

Q. When was that conversation?

A. Approximately four to five days before the merger, to my best recollection, was terminated by Jim.

Q. So about March 12, 1982, Norman Jurkscheit told y u to go to some lawyer to get merger papers drawn?

A. No, Jim Kolker told me to do that. Norman was acting as the reminding force.

Q. When did Norman remind you to do that?

A. During the period of my first conversation with Jim Kolker about that, one time, and he drew up some papers that were sent down to me. I don't know if Norman brought me some papers signed by Maryland Lumber for

them to take the number and I took them to the attorney as requested.

Q. When did Norman sugggest you talk to the attorney about drafting these "merger papers"?

A. Jim suggested it and Norman was saying go get them because it was his job to do what Jim told him to do.

Q. What was he telling you to go get?

A. Go get the papers for the merger that I had requested so it could be signed. "Jim will gladly sign them and they will go through and then we will change over the numbers simultaneously."

Q. So Norman specifically spoke to you -

A. And Jim.

Q. Let me finish. So Norman Jurkscheit specifically had a conversation with you about these merger papers?

A. Jim and Norman, yes, both.

Q. When did this conversation with Norman take place?

A. It must have been around the 12th. It was 10:00 or 11:00 o'clock in the morning. I called up the attorney, Mr. Ratick came and picked me up at the yard and we drive over to the attorney.

Q. So Norman spoke to you on or about March 12, 1982?

A. Jim spoke to me and Norman reminded me about it,yes.

Q. Norman spoke to you on our about March 12 is that right?

A. Yes.

Q. And in consequence of the conversation with Jim and Norman, in or around March, 1982, you went to an

attorney?

A. That is corrrect.

Q. Who did you go see?

A. We saw Matt Cleary III.

Q. At what law firm?

A. Clearly and Pijor, P-i-j-o-r.

Q. Do you remember the date you saw Matt Clearly?

A. I don't remember but he might have it on his calendar.

Q. But it would be on or around March 12, 1982?

A. It would be just a little bit before our meeting on that Saturday, I believe.

On or before that meeting on a Saturday I met with him at McDonalds. So if that will help, if we can figure what day that Saturday is we

can get almost the date. It would have

is going on without giving me any bookkeeping records, anything at all, and just threw me out in the cold. That is all I know, period.

I am sorry. I feel bad because I could feel my tongue and voice changing but that is how upset I get about it.

Q. Again, I am still trying to understand because I think there has been some conflicts in your testimony.

MR SHARLITT: I Don't think that is a way to introduce a question.

BY MR. COOPER:

Q. Marmott Exhibit 2 sets forth what could be two different scenarios, is that right?

A. This is talking paper discussed with

Jim Kolker. The man, party of the other part was Fabian, this told me that I merged. I asked for my merger papers. I wanted clarification on it. I put it down like this. I was told to go to another attorney. I went. I had a problem over Tom Stives. I went in and, Glenn, the jury will gladly make the decision on what they think is right. That is all I know about it.

Q. Does Marmott Exhibit 2 purport to set forth two different alternatives?

A. I don't know.

BY MR. COOPER:

Q. Mr. Marmott, referring to Marmott Deposition Exhibit Number 2, what did you tell Jim Kolker was the significance of the line dividng the two

sides?

MR. SHARLITT: If you told him anything.

THE WITNESS: I don't know.

BY MR. COOPER:

Q. Did you tell Jim Kolker that Fabian could decide which of those alternatives would be satisfactory?

A. I don't know.

Q. Did you tell Jim Kolker that Fabian could decide which of those alternatives would be satisfactory?

A. No.

Q. Was it your understanding that Fabian Kolker could select between the two alternatives represented by that document?

A. No.

Q. Was it your understanding that Fabian Kolker could select between the two

alternatives represented by that document?

A. I am not sure, as I told you before, of the exact date of my first contact with my attonrey that I was sent to buy Maryland Lumber. So I cannot for sure tell you that was said.

MR. COOPER: Could you read my question?

(The pending question was read by the Court Reporter.)

Q. Could you answer that question?

Understand.

Under the merger alternative it says 100 percent autonomy only Maryland Lumber, right?

A. And it shows Irene Lumber inside the Maryland Lumber circle.

Q. So if there was a merger under that then 100 percent autotonomy is Maryland Lumber, they would make all the decisions, is that right?

A. That would be correct.

Q. Under the joint venture alternative, Irene Lumber would make its own decisions and Maryland Lumber would not participate in the Irene Lumber decisions, is that correct?

A. That would be construed as right.

Q. And during the period of time that you and the Virginia branch from December 19th to March 17th or

thereabouts you believed that you had 100 percent autonomy at that branch?

A. I believe I have merged with Maryland Lumber and I believe my immediate superior was Fabian Kolker. And I believe that as an operations person what I was supposed to do was to operate.

Q. You were the big boss in Virginia according to you, is that right?

a legal framework to the business arrangement that the parties had already worked out, as I understood it. But your question intimated that the agreement would be effective only after the execution of the document, and I am not offering that opinion.

Q. Okay. What was Steve's understanding -- this is Steve's understanding --

A. All of it is.

Q. Of what would be effected as of the date he came into your office?

A. Steve's understanding, as he related it to me, was that the parties had reched this agreement as appears on Deposition Exhibit 1 and were already implementing the agreement, were already living by the agreement, and that there had been a failure on the part of the parties -- and I don't

recall if there was a suggestion that one person or the other had undertaken a responsibility to do it -- but there had been a failure to document, to provide the legal documentation necessary or desirable, at least shall we say, to document in legal terms what the business arrangement was that had been worked out and that the parties were living by.

Q. Trust me, I understand that. I am trying to find out what arrangement was that the parties assert that they

its inception until, again, to the best of my recollection, November of 1982.

Q. What happened in November of 1982?

A. Stock was turned in.

Q. Was there any consideration for your turning in the stock?

A. No.

Q. Why did you turn it in?

A. I felt I had no use for it.

Q. Was this a sudden decision?

A. I don't understand your question.

Q. Was it a sudden decision to turn in the stock?

A. No. It was a decision on my part to turn in the stock. I had no use for it.

Q. Did your wife also have stock up until that time?

A. Yes.

Q. How much stock did she have?

A. 5,000 shares.

Q. How much stock did you have?

A. 5,000 shares.

Q. At the time you had this stock up until November 1982, do you know what percentage of the total stock that

Plaintiffs claim that pursuant to ther terms of the unwritten agreement to merge, Stephen Marmott was to receive fifty percent (50%) of the profits generated by the Alexandria facility and an option to purchase Maryland Lumber's stock at a price to be subsequently determineed by the parties (App. 2561). In his deposition Marmott testified that under the terms of the agreement made on December 19, 1981, he would be entitled to purchase 'up to ten percent (10%) of Maryland Lumber's stock. The exact percentage of stock to which the option would apply was to be determined by comparing the profits generated by the Alexandria facility in its first year of operation to the total value of Maryland Lumber's stock (App. 189-192). Marmott went on to explain at two different points

in his depositon that the measuring year by which such profits were to be calculated was to be the 1982 calendar year. (App. 207-08).

279

Joint Venture | Merger

DEPOSITION EXHIBIT 2 9-14-84

profit

50% | 50%

100% Autonomy MID | FC 100% Autonomy

New Agency

Binding Joint Venture Agreement

Each Maintains Separate ownership

Total line in DBA

incl [illegible]

owned by Trust

[illegible]

MID (FC)

Exchange stock

100% ownership

incl. [illegible]

100% Autonomy

[illegible]

[illegible]

Stock exchange agreement

ownership stock

Employee

with ownership

profit

[illegible]

EXHIBIT M

The Maryland LUMBER Co. 360

2600 W. FRANKLIN ST. BALTIMORE, MD. 21223

LUMBER - PLYWOOD - MILLWORK - BLDG. MATERIALS

UNION TRUST COMPANY
BALTIMORE, MD

DATE	CHECK NO.	DISCOUNT	AMT. OF CHECK
12/24/81	12243		600.00

PAY AMOUNT PROTECTOGRAPHED BELOW

TO THE ORDER OF

The sum of $600 and 00 cts

Stephen L. Marmott

The Maryland Lumber Company

⑆052000016⑆ ⑈209-03928⑈ ⑈0000060000

ENDORSEMENTS

FIRST VIRGINIA BANK

DEC 28 1981